AN ANALYSIS OF THE CHANGES IN JURISDICTIONAL DECISIONS
AND POLICIES OF THE NATIONAL LABOR RELATIONS BOARD

BETWEEN 1947 AND 1960

by

Boyce R. Williams, Jr.

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STATEMENT BY AUTHOR

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This thesis has been approved on the date shown below:

J. E. Young
Assistant Professor of Economics

July 7, 1961
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Our federal government is generally agreed to have three broad functions: Executive, Legislative and Judicial. These are interdependent in operation. The interaction of the three functions is supposed to initiate a system of checks and balances which prevents the predominance of any one function. Congress fulfills the legislative function through the enactment of laws. The court system fulfills the judicial function through the interpretation of law. The executive function, as administered by the Office of the President and his staff, appears to consist of the encouragement and application of enacted law for the general benefit of the nation. The executive established administrative agencies to assist in the application of enacted law.

The National Labor Relations Board is one of several administrative agencies. The Board's responsibility is defined by Congress in the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947 and the Labor Management Reporting and Disclosure Act of 1959. Essentially the Board is required to protect and encourage the process of collective bargaining by administering the amended N.L.R.A. The Board's operations have been described as quasi-judicial. Its operations are judicial in that the Board interprets and applies enacted law, thereby being committed to a recognition of the importance of precedent. Its operations are also flexible in that the Board is not required to adhere to the technicalities of court room procedure. The ostensible value of the quasi-judicial operation is supposed to be an equitable consideration.
of employee and employer problems arising under the amended National Labor Relations Act. This consideration is in terms of saving the employee and employer time relative to the processes of the court system.

A reasonable conclusion appears to be that the only compelling reason for a change in the Board's policies and procedures would be due to congressional action in changing present laws or enacting new laws; court action in interpreting law; and practical considerations arising out of its operations in administering the law. Any other type of change presumably would be indefensible in terms of contributing to an efficient, equitable application by the Board of enacted law.

The general topic of federal vs. state jurisdiction was selected; however, only that portion of it dealing with employer-employee relations, which is regulated under the N.L.R.A., was included in this analysis. The reasons governing the choice were threefold. The relevant sections of the N.L.R.A., the L.M.R.A. and the L.M.R.R.D.A. laws governing this area are not clear as to the Board's proper role. Secondly, the federal courts' interpretations of these relevant sections does not alleviate the problem of the Board's proper role. Finally, the particular area of federal jurisdictional rights vs. state jurisdictional rights under the currently amended N.L.R.A. appears to be more susceptible to a political rationale than other aspects of federal-state jurisdiction such as under anti-trust law. This is due to the fact that the political philosophy of the two major parties in our country appears to be differentiated upon the philosophy of federal vs. states rights in terms of the country's welfare.

The proper role of an administrative agency in our government is
a problem presently facing our nation. This is evidenced by the attention given to the problem by current news and current legal periodicals. The particular aspect of the Board's role commanding current concern is the possibility of "inconsistency" and "political responsiveness" in its decisions. A Congressional investigation of the N.L.R.B. by a House labor subcommittee headed by Representative John H. Dent (Democrat-Pennsylvania) will focus public attention on union complaints. In hearings opening April 24, Dent will review board decisions since 1950 that unions allege to be biased, unfair or inconsistent. Whether political responsiveness of administrative agencies is a good thing or not is a subject upon which serious students of Government are still debating.

It is the purpose of this study to analyze the decisions of the National Labor Relations Board for the period 1947-1960. Only those which are concerned with the changes in the policies and the standards of the Board in their assertion of jurisdiction are examined. The Labor Relations Reference Manual, published by the Bureau of National Affairs, was used in determining case selection. Then each case was read and analyzed, by referring to the Decisions and Orders of the National Labor Relations Board, published by the U. S. Government Printing Office. This was done to find changes, if any, in the Board's policies and substantive content of its announced jurisdictional standards. The area covered by


this study is only a small part of the more general area of federal-state jurisdiction. However, this small part appears to be a significant part of the general area in that the federal pre-emption principle enables only the Board to initiate change in terms of applying the amended N.L.R.A. As a result, changes in this specific area of applying the law serve as a guide to other applications of this law, as well as other federal statutes which may conflict with those of the various states.
CHAPTER I

BOARD POLICY DEVELOPMENT AND CHANGES
REGARDING JURISDICTIONAL STANDARDS

The Pre-1950 Period of Ad Hoc Jurisdictional Standards

Uncertainty in Application of Standards.—The National Labor Relations Board was established in Public Resolution 44 approved by Congress on June 19, 1934. It consisted of three members appointed by the President of the United States. Its responsibilities were to investigate, order, and conduct union representation elections.¹ The National Labor Relations Act became law on July 5, 1935. The Board membership remained unchanged by Section 3 (a), Sections 2 (7), and 10 (a),² as interpreted by the courts, permitted the Board a broad, exclusive application of the Constitution’s commerce power.

Between 1935 and 1945 the Board aligned its jurisdictional


³The term ‘affecting commerce’ is defined to mean ‘in commerce or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce,’¹³ Section 2 (7) of the N.L.R.A. as quoted, Ibid., p. 10.

⁴This power (to investigate unfair labor practices and union representation questions) shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.” Section 10 (a) of the N.L.R.A. as quoted from 20 LRRM 3042.
policies with Sections 2 (7) and 10 (a) of the N.L.R.A. Its definition of an employer's operations that affected the flow of interstate commerce was extremely broad and inclusive. No one criterion served as a critical factor in influencing the Board's judgment. The dollar volume of an employer's business in interstate commerce was inconclusive. The direction of the flow of his interstate business was inadequate. How far his interstate business was removed from the actual flow of interstate commerce proved indecisive.

The Board's jurisdictional policy during this period was to extend its authority over as wide an area of business affecting interstate commerce as possible within the practical limits of its case load and budget appropriation. Cession agreements with state labor relations boards was the Board's method of extending its jurisdiction beyond imposed practical limits. But this method was not frequently used by the Board.

Pressures to Formalize Standards.—Section 3 (a) of the Labor Management Relations Act of 1947 expanded the Board to five members. The Board attached increasing importance to the dollar volume of an employer's business affecting the flow of interstate commerce. It would assert jurisdiction where the employer's volume of business in or close to the flow of interstate commerce was annually in excess of $100,000, regardless of

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5 *Somerset and Sommerville Manufacturing Companies*, 1 NLRB 864 (1936).

6 *Canyon Corporation*, 33 NLRB 885 (1941).

7 *I. L. Hudson Company*, 42 NLRB 536 (1942).
whether purchases or sales.\textsuperscript{8} It would decline jurisdiction where the employer's volume of business was removed from the flow of interstate commerce, regardless of the dollar amount.\textsuperscript{9}

A policy clash arose between Board members over the relative importance of dollar volume figures. In the \textit{Liddon White Truck Company} case\textsuperscript{10} the Board asserted jurisdiction over a truck company whose annual sales of $150,000 were within the state of Tennessee. The company purchased $15,420 worth of parts out of state each year. Chairman Herzog and Member Murdock in dissenting stated that this decision ignored the purpose of the Board's concern with dollar volume of an employer's operations affecting interstate commerce. Where dollar volume was small, they stated the Board should refrain from asserting its full jurisdiction because the additional case load received by the Board from the Taft-Hartley Act would render such action impractical. The Board adhered to members Murdock's and Herzog's dissent in the \textit{Hom-Ond Food Stores, Inc.} case.\textsuperscript{11} It refused to assert jurisdiction over this company because all of its sales were within the state of Texas, while purchases from outside the state were insignificant. The Board's jurisdictional policy in relation to the amended section 10 (a) of the NLRA was to interpret it

\textsuperscript{8} Coopersville Cooperative Elevator Co., 73 NLRB 480 (1947); Foreman and Clark Co., 74 NLRB 77 (1947); Coca Cola Bottling Co., 74 NLRB 1098 (1947); Burnett-Binford Lumber Co., 75 NLRB 421 (1947).

\textsuperscript{9} Herff Motors Co., 74 NLRB 1007 (1947); F. G. Congdon Co., 74 NLRB 1081 (1947). In both cases the Board declined jurisdiction when dollar volume was over $100,000.

\textsuperscript{10} 76 NLRB 1181 (1948).

\textsuperscript{11} 77 NLRB 647 (1948).
The Board would not cede jurisdiction to a state unless it had a statute in conformance with the substantive content and interpretation of Section 10 (a), regardless of whether the employer’s business actually affected interstate commerce. 13

Beginning of Formal Jurisdictional Standards

On October 5, 1950, the Board announced formal jurisdictional standards in eight consecutive decisions. These standards covered nine categories of business.

1. Instrumentalities and channels of interstate and foreign commerce:

   "We ... reaffirm Board Policy of asserting jurisdiction over instrumentalities and channels of interstate and foreign commerce." 14

2. Public utility and transit systems:

   "Our experience has shown that public utilities, including public transit systems ..., have such an important impact on commerce as to warrant our taking jurisdiction over all cases involving such enterprises, ... subject only to the rule of de minimis." 15

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12 A proviso was added to the original statement. See footnote 4. "... Provided, that the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industries (other than mining, manufacturing, communications and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith." 20 LMRR 3042.

13 Kaiser-Fraser Parts Co., 80 NLRB 1050 (1948); Adams Motors, Inc., 80 NLRB 1519 (1948).


3. Companies which operate as an integral part of a multistate enterprise:

"... we continue to believe that when a plant is owned and operated by a company which is a multistate enterprise, we should ... (assert) jurisdiction, even though management is entrusted to local officials and a plant may sell its entire product within the state where it is located." 16

4. Companies which produce or handle goods for out of state shipment, or perform services out of state valued over $25,000 per year:

"In future cases we will exercise jurisdiction over employers which annually ship goods valued at $25,000 or more out of a State." 17

5. Companies which provide services or materials to other companies in categories 1, 2, 3, or 4, valued over $50,000 per year:

"The Board has determined ... it will assert jurisdiction over enterprises which affect commerce by virtue of the fact that they furnish goods or services necessary to the operations of other employers engaged in commerce ... where such goods or services are valued at $50,000 per annum or more, and are sold to ... (companies operating in categories 1, 2, 3, or 4)." 18

6. Companies which have a direct inflow of goods or materials from out of state valued over $500,000 per year:

"... we continue to decline jurisdiction where direct inflow is less than $500,000 in value annually." 19

7. Companies which have an indirect inflow (goods or materials must pass through a local distributor to the company) of goods and materials from out of state valued over $1,000,000 per year:

"... regardless of the nature of the enterprise, where the indirect inflow totals at least $1,000,000 annually, we shall treat that factor alone as sufficient basis for asserting jurisdiction." 20

8. Companies which have a combination inflow and/or outflow of goods and/or services which is valued over the dollar minimums of any of the other seven categories:

16 Borden Co., Southern Division, 91 NLRB 628 (1950).
18 Hollow Tree Lumber Co., see footnote 14.
This standard was further modified in its initial application. The Board would also use percentages. Each particular dollar volume of a company's business that falls within the various jurisdictional categories would be compared as a percentage of the dollar volume minimums of each particular category. The percentage of each category was then totaled with the percentages of the other categories. If the sum total was over 100% then the Board would assert jurisdiction.21

This modification was clarified in a later case. The assertion of jurisdiction was graphically portrayed.

Company's direct inflow was $336,317 or 67% of the $500,000 Std.  
Company's indirect inflow was $26,155 or 3% of the $1,000,000 Std.  
Company's direct outflow was $2,932 or 12% of the $25,000 Std.  
Company's indirect outflow was $9,049 or 18% of the $50,000 Std.22

9. Companies which have a substantial effect upon the national defense:
"We find it will effectuate the policies of the Act to assert jurisdiction over enterprises which substantially affect national defense."23

The Board stated its reasons for formalizing its jurisdictional standards in the Hollow Tree Lumber Company case.24

The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress but to limit that exercise to enterprises . . . (which have) a pronounced impact upon the flow of commerce. These standards reflect in large measure, the results in the Board's past decisions, disposing of similar jurisdictional issues.25

The substantive content of the instrumentalities and channels of interstate commerce standards remained unchanged during the remainder of Mr. Herzog's chairmanship. The Board asserted jurisdiction over radio

22 Pacific Tent and Awning Co., 97 NLRB 640 (1951).
24 91 NLRB 635 (1950).
25 Ibid., p. 635.
stations, newspapers, banks and telephone companies. In each case decision the Board cited past precedent as a basis for its assertion of jurisdiction over these particular industries. 26

The Board altered its jurisdictional policy in relation to the taxicab industry. In the past it had declined jurisdiction on the basis that the industry had an insufficient impact upon interstate commerce. 27 Following the 1950 standards, the Board reversed this past policy so as not to conflict with its present policy of asserting jurisdiction over all channels of interstate commerce. 28 However, in late 1952, the Board returned to its original policy in relation to the taxicab industry, in view of the 1950 standards. In the future it would assert jurisdiction over those taxicab companies which served as a sole instrumentality of commerce in a city or which were under a contract giving them exclusive rights to serve a depot or terminal in a city. In addition, the Board would assert jurisdiction if the company derived a substantial portion of its total revenue from carrying passengers to depots or terminals. 29 The Board applied this policy throughout the remainder of Mr. Herzog's term as Chairman. 30


27 Yellow Cab Co., 90 NLRB 1884 (1950).

28 Red Cab Inc., 92 NLRB 175 (1950).


30 Taxi Transit Co., 102 NLRB 45 (1953).
The substantive content of the public utility and transit system jurisdictional standard was not changed prior to Mr. Farmer's Chairmanship. The Board asserted jurisdiction over the gas, electric, water, and transit industries. It continued to use the case citation method in observance of past precedent. However, the Board did not adhere to this practice in each particular case.\(^{31}\)

The substantive content of the multistate enterprise, the direct outflow, the indirect outflow, and the combination outflow-inflow, jurisdictional standards, was not changed during Mr. Herzog's Chairmanship. The Board asserted jurisdiction over franchise dealers, interstate chain retail stores, moving picture chains and restaurant chains, under the multistate enterprise standard.\(^{32}\) Under the direct outflow standard it asserted jurisdiction over rock quarry, dry cleaning, funeral home and chemical processing industries.\(^{33}\) In relation to the indirect outflow

\(^{31}\text{Citizens Gas Co., 92 NLRB 1743 (1951), natural gas industry; Plymouth Electric Cooperative Association, 92 NLRB 1183 (1951), electric power industry, cited Buckeye Rural Electric Cooperative, 88 NLRB 196 (1950); Rose City Tours, Inc., 92 NLRB 1254 (1951), public transit industry, cited Local Transit Lines, see footnote 17; Wichita Water Co., 93 NLRB 895 (1951), water power industry.}\)

\(^{32}\text{Baxter Brothers, Inc., 91 NLRB 1480 (1950), retail auto sales industry, cited Kaljian Chevrolet Co., 82 NLRB 978 (1949) and Johns Brothers, Inc. et al., 84 NLRB 294 (1949); Holm Tractor and Equipment Co., 93 NLRB 222 (1951), farm and dairy equipment dealers industry, cited Hallam and Boggs Truck and Implement Co., 92 NLRB 1339 (1950); Hunts Television, Inc., 92 NLRB 29 (1950), radio and television industry; Sears and Roebuck and Co., 91 NLRB 1411 (1950), interstate chain retail store; Gambel Enterprises, Inc., 92 NLRB 1528 (1951), moving picture chain; Howard Johnson, Inc., 94 NLRB 1161 (1951), restaurant chain.}\)

\(^{33}\text{Peerless Quarries, Inc., 92 NLRB 1194 (1950), rock quarry industry; Samuel Bernstein and Co., 98 NLRB 1144 (1952), dry cleaning industry; Pierce Brothers Mortuary, 99 NLRB 1 (1952), funeral home industry; Owensboro Plating Co., 103 NLRB 993 (1953), chemical processing industry.}\)
standard the Board asserted its authority over the fur, fruit, steel fabrication, garbage collection, bottled gas, concrete and cotton gin industries. The Board applied this particular standard in the majority of its jurisdictional cases prior to the appointment of Mr. Farmer as Chairman. The combination inflow-outflow standard was applied to the cotton gin and bakery industries. No jurisdictional questions arose which required the Board's application of the direct or indirect inflow standards. The national defense jurisdictional standard was partially modified. The Board decided to assert jurisdiction over any business whose location was within the confines of a military reservation, regardless of its dollar volume or the relationship of its activities to national defense. The Board continued to refer to past precedent in a sporadic manner.

The Board reaffirmed a long standing jurisdictional policy of declining jurisdiction over the hotel industry. It continued a policy

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34 Queens-Premier-Williams Fur Dressing, 92 NLRB 42 (1950), fur cleaning industry; National Perishable Inspection Service, 97 NLRB 779 (1951), fruit inspection industry; Metallic Building Co., 98 NLRB 386 (1952), steel fabricating industry; Oakland Scavenger Co., 98 NLRB 1318 (1952), garbage collection industry; National Gas Co., 99 NLRB 273 (1952), bottled gas industry; Dallas Concrete Co., 102 NLRB 1292 (1953), concrete industry; Tule River Cooperative Gin, Inc., 102 NLRB 1523 (1953), cotton gin industry.

35 National Gas Co., see footnote 34, cotton gin industry; Gottfried Baking Co., 103 NLRB 227 (1953), baking industry.

36 Richland Laundry and Dry Cleaners 93 NLRB 680 (1950); Johnnie W. Miller Sandwich Co., 95 NLRB 463 (1951); Coburn Catering, 100 NLRB 1133 (1952).

37 Hotel Association of St. Louis, 92 NLRB 1388 (1950).
of asserting plenary jurisdiction over this industry in the District of
Columbia and the Territories of the United States.\textsuperscript{38} Two new policies
were initiated by the Board. First, it would not assert jurisdiction
over non-profit organizations or educational institutions, whose activi-
ties were of non-commercial nature,\textsuperscript{39} or were directly related to "edu-
cation."\textsuperscript{40} Secondly, the Board initiated a policy to cope with a situa-
tion where an employer appeared in a formal hearing lacking complete
annual financial data requisite for its jurisdictional decision. The
Board decided to accept what figures the employer could make available
and project them over a twelve month period.\textsuperscript{41}

Post-1952 and the "Republican Board"

Procedural Changes in Board Policy.—The Board membership changed
in 1953 when the Republican Administration entered office. Enough

\textsuperscript{38}District of Columbia, Willard Inc., 2 NLRB 1094 (1937); Raleigh
Hotel Co., 7 NLRB 353 (1938); Westchester Apartments, Inc., 17 NLRB 433

\textsuperscript{39}Illinois Institute of Technology, 81 NLRB 20 (1949). The Board
asserted jurisdiction. Industrial research was financially supported by
business. Port Arthur College, 92 NLRB 152 (1950). The Board asserted
jurisdiction. The Institution was operating a commercial radio station.

\textsuperscript{40}Sunday School Board of the Southern Baptist Convention, 92 NLRB 801 (1950).
The Board asserted jurisdiction. The corporation was publishing and edit-
ing religious literature.

\textsuperscript{41}The Trustees of Columbia University in the City of New York, 97
NLRB 424 (1951). The Board refused to assert jurisdiction over the opera-
tions of a school library.

\textsuperscript{41}C & A Lumber Co., 91 NLRB 909 (1950).
Democrats were replaced by Republicans to give the latter a majority. Following this change, the Board's 1950 standards and jurisdictional policies were altered to a large extent. The new Board used three techniques to effect its change. It overruled some previous applications, ignored applications or disagreed with the substantive content of the 1950 standards. These techniques were employed in the majority of the Board's jurisdictional questions during the period up to and immediately preceding the 1954 revised standards.

In the Checker Taxi Co. case the Board overruled the application of the instrumentalities and channels of interstate commerce standards to the taxicab industry. It said the employer's business did not reflect a substantial impact upon interstate commerce. Member Murdock in dissent stated that in the Cambridge Taxi Co. case that the employer derived only two per cent of his total revenue from deliveries to depots or terminals of interstate commerce. In this particular case the employer derived twenty-three per cent of his total revenue from exactly the same operation. In the former case the Board asserted jurisdiction, when the percentage of money involved was small, because the employer was acting as an instrumentality of interstate commerce. In this case Mr. Murdock

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\(^3\) 107 NLRB 921 (1953).

\(^4\) See footnote 29.
noted that the percentage of money was significantly larger. In addi-
tion, the operation was exactly identical to the former employer's opera-
tion. Yet the Majority refused to assert jurisdiction. In addition, 
they overruled the application of this particular standard to the news-
paper industry. 45

The Majority failed to observe the application of the public 
utility and transit system jurisdictional standard in the electric and 
public transit industries. The Inter-County Rural Electric Cooperative 
purchased electricity from the Kentucky Utilities Company at a cost of 
$100,000 per year. 46 It resold its electricity at a value of $400,000 
to eight thousand rural customers. "The employer's operations appear to 
be essentially intrastate in character . . . . We believe that its opera-
tions do not have a sufficient impact upon interstate commerce to justify 
our taking jurisdiction . . . . The employer concedes that it is engaged 
in commerce within the meaning of the Act . . . ." 47 The Majority cited 
no past case decision in reaching this conclusion.

In dissent, Member Murdock emphasized that the Board had been 
asserting jurisdiction in this area for the past three years. He said 
that in the initial case governing this area the Board specifically 
noted that the percentage of money was significantly larger. In addi-
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\[\text{\footnotesize 45 Wave Publications, Inc. v. 106 NLRB 1064 (1953) overruled Wave}\\ \text{\footnotesize Publications, Inc. v. 90 NLRB 274 (1950).}\\ \text{\footnotesize 46 106 NLRB 1316 (1953).}\\ \text{\footnotesize 47 Ibid. p. 1317.}\\\]
because they were constituent parts of the flow of interstate commerce. The fact that a large proportion of the company's customers are rural consumers has never been deemed a valid reason for exempting a public utility from the standard. We have taken jurisdiction over so many similar rural electric cooperatives, that there is no need to begin citing cases. The Board continued the same "insufficient impact" reasoning in declining to assert jurisdiction over a public transit operation which was the only available means of transportation to a town.

The Board's application of the multi-state enterprise jurisdictional standard represented the single instance of a detailed dissent by a Republican member prior to the revision of the 1950 standards. The particular case involved a retail auto dealer operating under a franchise. The Board assert jurisdiction upon the basis of a large body of past precedents. "To dismiss this case on grounds of administrative self restraint would require revision of the Board's jurisdictional policy ... which in our view is a reasonably definite yardstick for industry and labor." The other premise, for declining jurisdiction, relating to the competency of state boards "... seems to us hardly tenable, even assuming the undoubted competence of the Wisconsin board, when it is noted that by the

48 Ibid., p. 1317.
49 Inter-County Rural Electric Cooperative, see footnote 46, p. 1317. The Board continued the policy in this case. Coles-Moultrie Electric Cooperative, 107 NLRB 30 (1953); Upshur Rural Electric Cooperative, 107 NLRB 207 (1953).
51 Klinka's Garage, 106 NLRB 969 – 988 (1953).
52 Ibid., p. 970.
provision of the very Act we administer it is not possible to cede jurisdic­tion to the Wisconsin board.\textsuperscript{53}

Chairman Farmer in his dissent disagreed with the Board's assertion of jurisdic­tion. He advocated declining jurisdiction. He stated that the employer was a "small local business man." Time and money used to investigate his operations were being wasted. The Wisconsin board could more adequately investigate the case, for "... this small business is an essential part of the operations of the General Motors Corporation in precisely the same degree as a single drop of salt water is an essential ingredient of the Pacific Ocean."\textsuperscript{54} The Board eventually began to decline jurisdiction over retail franchise dealers upon the basis of Chairman Farmer's dissent in this case.\textsuperscript{55}

In considering the direct outflow jurisdictional standard the Board once again overruled past precedent controlling its policy in relation to the cotton gin industry.\textsuperscript{56} The employer, Mr. J. McCormack owned a number of fruit ranches and a fruit packing shed. The fruit packed, graded, and placed in railroad cars was "... in excess of $32,000 during the 1952 season and in excess of $27,000 during the 1953 season. All of the fruit was shipped to points outside the State of California."\textsuperscript{57}

\textsuperscript{53}Ibid., p. 970.
\textsuperscript{54}Ibid., p. 974.
\textsuperscript{55}Babb Motors, 108 NLRB 1140 (1954); Batson Co., 108 NLRB 1337 (1954).
\textsuperscript{56}John McCormack Co., 107 NLRB 606-611 (1953), overruled Tule River Cooperative Gin, Inc., see footnote 34.
\textsuperscript{57}John McCormack Co., see footnote 56, p. 607.
This packing was done by a Mr. Hill who received about $10,000 per year for his services. The Board refused to assert jurisdiction because Mr. Hill was an independent contractor who sold Mr. McCormack $10,000 worth of labor services per year. This was considerably less than the necessary $50,000 minimum required by the indirect outflow jurisdictional standard.

Member Murdock in his dissent stressed the inapplicability of the indirect outflow standard in this case. He stated the direct outflow standard would logically apply if the Board was not preoccupied with title to goods. Mr. Hill directly placed goods in excess of $25,000 per year in railroad cars to be shipped in interstate commerce. The decision in this case was in direct conflict with that in the *Tule River Cotton Gin* case, where the Board explicitly stated that title to goods was "immaterial" in determining jurisdiction. "To hold that Hill, who actually places the fruit in interstate carriers, is not engaged in handling goods determined for out-of-state shipment is to rob words of their meaning." The Majority ignored Member Murdock's dissent and continued to exhibit a concern with title to goods in future cases. They also disagreed with the substantive content of the direct outflow standard in its application to other industries.

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The Board introduced a new policy in overruling the indirect out-flow jurisdictional standard. The employer in the Brooks Woods Products case was engaged in the production and sale of wooden separators and pallets.\(^{61}\) Annually he sold \$223,000 worth of these products to the Plymouth Wood Products Co. The latter company in turn sold seventy per cent of Brooks Woods' products to the Kelsey-Hayes and Budd companies. The latter two companies used about \$84,000 worth of Brooks Woods' separators and pallets in interstate shipment of goods. The Majority, while agreeing that Brooks Woods was engaged in interstate commerce, did not assert jurisdiction. "As the Respondent's (Brooks Woods) business is not once, but twice removed from interstate commerce, the volume of business is immaterial."\(^{62}\) They explained that the respondent had to sell his goods directly to Budd and Kelsey Hayes in order for the Board to assert jurisdiction under the standard.

Member Murdock again questioned the Majority's concern with title to goods.

"The Majority does not explain how the mere paper transfer of title can achieve this result (lessen the impact of a strike by the employees of Brooks Woods that would affect Budd or Kelsey-Hayes) as indeed they cannot . . . . The fact remains that the Respondent cannot deliver crating materials to Budd and Kelsey-Hayes because of a labor dispute, there will be an impact on the latter's ability to ship their products out of state."\(^{63}\)

He emphasized that the Supreme Court stated in the Fainblatt case that

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\(^{61}\) 107 NLRB 237 - 243 (1953).

\(^{62}\) Ibid., p. 238.

\(^{63}\) Ibid., p. 240.
title to goods was immaterial in determining the impact of an employer's operations upon interstate commerce. "We cannot say, other things being equal, that the tendency differs in kind, quantity or effect merely because the merchandise which the manufacturer ships instead of being his own, is that of a consignee or his customer in other states. In either case commerce is being obstructed in the same way and to the same extent." The Board continued to overrule the indirect outflow standard in other areas. In addition the Majority continued to disagree with its substantive content.

In its preoccupation with title to goods, the Board was illogical in failing to apply the direct inflow jurisdictional standard. The Evans Food Stores, Inc. purchased goods valued at $6,000,000 per year. $1,380,000 of this sum represented purchases of national brand goods. Of this latter sum $500,000 constituted direct purchases from outside the state of Texas. Brokers ordered the goods. However, they held no title to the goods nor received any remuneration from the Evans Food Stores for their services. The Board refused to assert jurisdiction because the brokers ordered the goods.

Member Murdock noted that this decision was "both contrary to

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66 Ibid., p. 240, as quoted from the Supreme Court decision.

65 Local 1083, United Auto, Aircraft and Agricultural Implement Workers of America, 107 NLRB 470 (1953), overrules Coburn Catering Co., 100 NLRB 1133 (1952) and Fairchild Cafeteria, 92 NLRB 809 (1950).


unreversed precedents and to logic." In violating precedent, the Board's decision was in conflict with the Federal Dairy case. In violating logic, the decision was in direct conflict with the recent Brooks Woods case.

Even assuming the correctness of the Majority's approach . . . the Board should follow the title of the products involved to ascertain whether their movement constitutes a direct or indirect movement in commerce, that approach requires a finding that the goods were received by the respondent from the out-of-state manufacturers or brokers, who subsequently elected to place the order with out-of-state manufacturers. For the goods came directly from the out-of-state manufacturers to the respondent, title passed from the out-of-state manufacturers to the respondent and the out-of-state manufacturers billed the respondent for the purchase price of the goods.

In short, the goods were sold directly to the Evans Food Stores by the out-of-state manufacturers. Therefore, the Board should have asserted jurisdiction in line with their reasoning in the Brooks Woods Case.

In addition, the Majority continued to disagree with the substantive content of the direct inflow standard in its application to other areas.

The Majority did not fail to apply or overrule the indirect inflow and combination inflow-outflow jurisdiction standards due to the

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68 Ibid., p. 1651.
69 See footnote 19.
70 Ibid., p. 1653.
71 See paragraph one, p. 20.
lack of any applicable cases. However, they disagreed with the substantive content of both standards. Yet in disagreeing, they never, in a single decision, elaborated upon the reasoning supporting their discontent.

In applying the national defense jurisdictional standard, the Majority overruled the Board's past policy and standard governing this industry. Taichert's Inc. was a company located at Los Alamos, New Mexico. It sold $180,000 worth of merchandise per year to the local inhabitants of the town. "Los Alamos, both as a community and as a functional project, is devoted entirely to the Atomic Energy Commission program." The Majority would not assert jurisdiction after making this observation because, "The assertion of a jurisdiction here would . . . disclose . . . a bureaucratic impulse to push the jurisdiction of this Board to its uttermost limits . . . . The complete explanation of our (non-assertion of jurisdiction) lies in the fact that we do not think the company will substantially affect the A.E.C. laboratory." 

In dissenting, Member Murdock noted that this decision marked a radical departure from the Board's previous interpretation of this standard. In the past, the Board had made it explicitly clear that dollar


74 107 NLRB 779 - 787 (1954).

75 Ibid., p. 781.

76 Ibid., p. 781.
volume of business was inconsequential in the assertion of jurisdiction over an industry affecting national defense. In a case specifically concerned with a business's operations that were related to the atomic energy industry, the Board said, "In our opinion, any employer doing business on such an atomic energy reservation, whether or not his business is absolutely essential . . . is nonetheless so identified with the government's national defense program as to warrant the full exercise of the Board's jurisdiction." In this case Mr. Murdock observed that the A.E.C. had deemed the respondent necessary to the proper functioning of the community. Therefore, he did not understand the Board's reasoning in this decision. "I find it difficult to understand the value judgment which moves this Board . . . in refusing to take jurisdiction of an enterprise declared by the A.E.C. to be an essential business in a town whose residents are essential to the atomic energy program of the United States." In moving from the specifics of this case to the broader implications of the Board's new policy and standard approach to jurisdiction questions, Mr. Murdock noted that the Majority's reasoning was in conflict with the legislative intent of the Taft-Hartley Act. "Congress has not said that collective bargaining is a good thing for big businesses but not for small businesses; it has not said that employees of large employers should be protected from unfair labor practices by employers and

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77 Westport Moving and Storage Co., see footnote 23.
78 Taichert's, Inc., see footnote 74, p. 783, as quoted from p. 680 of the Richland Laundry and Dry Cleaners case, see footnote 36.
79 Taichert's, Inc., see footnote 74, p. 784.
unions but the rights of employees of small employers may be trampled on with impunity. The Majority ignored Mr. Murdock's dissent and continued to overrule or failed to apply the past standards governing this area. Their rationale remained unchanged from this particular decision. In the few instances where the Majority applied the national defense standard they disagreed with its substantive content.

The "projection of financial data" and "hotel industry" jurisdictional policies remained unchanged during this period. However, the Majority ignored the Board's past policies governing non-profit and educational institutions. The Armour Research Foundation of the Illinois Institute of Technology purchased approximately $2,800,000 worth of materials during fiscal 1953. About fifteen per cent of $420,000 worth of these materials were received by the company from out of state. The Majority ignored these figures. They would not assert jurisdiction. "Only twenty-seven per cent of the Foundation's work is commercially sponsored." Therefore, Armour Research Foundation's activities are, "intimately connected with the educational activities of the Institute." The Majority

80 Ibid., p. 786.
81 Alpine Mill and Lumber Co., 107 NLRB 915 (1954); Western Area Housing, 107 NLRB 1263 (1954); McArthur Jersey Farm Dairy, Inc., 107 NLRB 885 (1954); Ideal Laundry and Dry Cleaners, 107 NLRB 935 (1954); Atkinson Electric Co., 106 NLRB 721 (1954).
84 Ibid., p. 1053.
85 Ibid., p. 1053.
cited the Trustees of Columbia University case as the basis of their reasoning in this decision. 86

Member Murdock in dissenting pointed out that this decision specifically overruled an earlier decision of the Board's in relation to this particular educational institution. 87 In the earlier decision the Board held the exact opposite of the Majority in this case. The institution's activities were primarily commercial and secondarily educational. "I cannot comprehend the ultimate conclusion that the Foundation's activities are 'non-commercial' in nature. Surely twenty-seven per cent amounting to $2,500,000 per year cannot be deemed . . . an incidental aspect of the Foundation's work." 88 Mr. Murdock noted that the case cited by the Majority referred to a university library. He could see no analogy between that special situation and the present case.

Revised Substantive Content of Formal Standards.—On July 15, 1954, the Board announced in a press release a revised set of jurisdictional standards. They were to replace the 1950 standards. The Majority gave an explanation of the change in the Breeding Transfer Co. case. 89 They stated that there had been an increase in the Board's case load. Its annual budget appropriations had not increased proportionately. In addition, the Majority was interested in retracting the jurisdictional

86 See footnote 40.
87 Illinois Institute of Technology, see footnote 39.
88 Armour Research Foundation of the Illinois Institute of Technology, see footnote 83, p. 1053.
89 110 NLRB 493 - 534 (1954).
area of the Board as governed by the 1950 standards. "... the purpose of our jurisdictional standards is to eliminate purely local activities, the true impact of our change is more intelligently understood in terms of the number of employees affected rather than the number of companies excluded." Mr. Farmer emphasized that the standards represented the results of an arduous and detailed investigation of the application of the 1950 standards. The Majority's conclusion was that the new standards did not represent a retraction of the Board's jurisdictional area to any significant degree. The statistics used by the Majority in reaching this conclusion were furnished to them by the Bureau of Old Age Survivors Insurance. They were compiled in 1947.

Considering all the information available to us bearing in mind the fact that the mass industries ... in which the vast majority of workers are gainfully employed are in no wise affected by these changes, we judge that the changes now made in jurisdictional standards will reduce the Board's case load by no more than ten per cent, and in terms of employees will affect no more than one per cent of the total number of employees subject to ... the Board's legal jurisdiction.

The Majority moved from its reasons in support of the new standards to an attack upon the dissenting members of the Board. They noted that Mr. Murdock's criticism of the reasoning behind the new standards, "... (was) that the Board has no legal or moral right to self impose any restrictions upon its activities, and that we are inexorably bound to extend our regulatory authority to the outermost boundaries of the Federal

90 Ibid., p. 499.
91 Ibid., p. 500.
Constitutional power."\(^{92}\)

The repeated accusations running through the separate opinions of both Mr. Murdock and Mr. Peterson that our policy determinations are arbitrary and capricious can only be intended to belabor the incorrect premises that the 1950 standards were reached by a logical syllogism and mathematically provable calculations.\(^{93}\)

Member Murdock initiated his dissent with what appeared to be the underlying reason for the Majority's change in jurisdictional standards.

There is no question about the underlying consideration dictating the majority's action . . . is one far removed from a legal determination . . . . The slack in jurisdiction . . . has been frequently promised and predicted in public speeches of members of the majority during the past year in keeping with the announced belief in the philosophy of returning a greater share of Federal authority to State and Local governments.\(^{94}\)

He emphasized such action was in direct conflict with legislative intent and judicial interpretation of the Taft-Hartley Act. "Such action inescapably entails an assumption of legislative power by an administrative agency, contrary to the principle of separation of powers under our constitutional system."\(^{95}\) "The Board has provided no data to support the necessity or justification for this retrenchment based upon budgetary limitations or other administrative necessities."\(^{96}\) He then noted that

\(^{92}\)Tbid, p. 494.

\(^{93}\)Tbid, p. 496.

\(^{94}\)Tbid, p. 502.

\(^{95}\)Tbid, p. 501.

\(^{96}\)Tbid, p. 501.
the Majority's statistics, "... excluded 50% of all employees at radio
stations or 500,000 retail auto employees, or the hundreds of thousands
of employees in retail service, office building, intra and interstate
transit operations, etc." In addition, he said this data was out of
date. His statistics were drawn from research completed in 1952 by the
Board's Industrial Analysis Branch. He noted the irony of the Majority's
statistics in that they supported his criticism. Congress was attempt­
ing to protect the small employer in awarding exclusive jurisdiction to
the Board. Yet the Majority's statistics pointed out the exact opposite
effect. It would be the small employer that suffered the most from the
application of the new jurisdictional standards. Member Murdock con­
cluded that the Majority's criticisms of his dissent, "... serve only
as a straw man to divert attention from the vital issues involved." His
dissent was not focused upon arguing the "fact of modification." It
was directed against the "purpose and effect" of the new jurisdictional
standards.

Member Peterson disagreed with the implication in Mr. Murdock's
dissent that the Board must exercise jurisdiction. He pointed out that
its assertion of jurisdiction was a legal right, not a requirement. The
Board may use its discretion in implementing this right. However, he
disagreed with the Majority's drastic increase in the dollar amounts re­
quired under the revised standards.

97 Ibid., p. 508.
98 See footnote 97.
99 Ibid., p. 501.
These new standards applied to ten categories of business:

1. Instrumentalities and channels of commerce:
   A. Intrastate trucking and similar firms engaged in business with interstate firms that have a volume of annual business in excess of $100,000.
   B. Radio and television stations that have an annual volume of business in excess of $200,000.
   C. Newspaper companies that have an annual volume of business in excess of $500,000.

2. Public utility and transit systems:
   A. Local power, gas, and water utilities, in addition to intrastate public transit systems that have a volume of annual business in excess of $3,000,000.
   B. Public transit systems engaged in interstate commerce that have an annual volume of business in excess of $100,000.

3. Companies, other than retail, which operate as an integral part of a multistate enterprise:
   A. The company has an annual direct outflow of business into interstate commerce in excess of $50,000; has an annual indirect outflow of business into interstate commerce in excess of $100,000.
   B. The enterprise of which the company is an integral part has an annual direct outflow volume of business in excess of $250,000.
   C. Jurisdiction will not be exercised over a company on the sole criterion of operating under a franchise received from a nationwide enterprise.

4. Companies which produce or handle goods destined for out of state shipment, or perform services outside of the state in which the company is located, where such goods or services exceed annually $50,000 in value.

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100 34 L.R.R.M. 75-76.
5. Companies which furnish goods and services annually valued in excess of $100,000 to other companies which conduct business in interstate commerce annually valued in excess of $50,000. The goods or services of the former companies must be directly utilized by the latter companies in interstate commerce.

6. Companies, other than retail, which operate as an integral part of a multistate chain enterprise:
   A. The company has an annual direct outflow of business into interstate commerce in excess of $200,000.
   B. The chain of which the company is an integral part has an annual indirect outflow volume of business in excess of $1,000,000.
   C. Jurisdiction will not be asserted over general or public buildings on the basis that the tenants residing within are covered.

7. Companies, other than retail, which receive an annual direct inflow of business from interstate commerce in excess of $500,000.

8. Companies, other than retail, which receive an annual indirect inflow of business from interstate commerce in excess of $1,000,000.

9. Retail stores:
   A. Independent retail stores, whether a single store or part of a chain, operating entirely within a state:
      1. the store has a direct inflow of business in excess of $1,000,000 annually.
      2. the store has an indirect inflow of business in excess of $2,000,000 annually.
      3. the store has a direct outflow of goods into interstate commerce in excess of $100,000 annually.
   B. Chain retail stores operating in more than one state:
      1. the store meets any of the requirements under A.
      2. The chain's gross sales exceed $10,000,000 annually.
      3. Jurisdiction will not be asserted over public restaurants regardless of volume of business or whether part of a multistate chain.
10. **Companies whose business affects national defense:**

A. The company's goods or services must be directly related to national defense.

B. The company's goods or services must be furnished pursuant to a government contract.

C. The annual value of such goods or services must be in excess of $100,000.

The substantive content of the instrumentalities and channels of interstate commerce jurisdictional standard remained unaltered as did the Board's policy of application. The Majority refused to assert jurisdiction over an interstate trucking firm because the employer failed to meet the dollar minimum of the standard. The employer was under government contract to deliver mail between the towns of Eugene and Myrtle, Oregon. He received $59,093 annually from the government for this service. This amount was considerably less than the $100,000 minimum.

Member Murdock, in dissenting, noted the Board's failure to observe judicial precedent in relation to the U.S. mail. Beginning with the Pullman strike in 1894 the courts made it clear that the flow of the U.S. mail could not be obstructed. He emphasized the U.S. mail represented a vital part of the flow of interstate commerce. "I cannot assume, nor can this Board, I believe, that the citizens of the locality served by this Employer in Oregon write only to each other or to other Oregon addresses and similarly receive only such mail..." In concluding Mr. Murdock stated, "...to attempt to measure the impact of such


activity upon commerce by the gauge of the Employer's receipts is both futile and misleading."

In the radio and television industry the Majority also refused to assert jurisdiction in that the employer failed to meet the standard. He was engaged in the operation of a local radio station. His gross annual revenue was approximately $85,000. This amount was considerably less than the required $200,000 minimum.

Members Peterson and Murdock in a mutual dissent questioned the Majority on the origin of this standard. They noted that the Majority had failed to "... apprise anyone in detail as to where the new standard had its origin, what its purpose was and what its effect would be ..." They stressed "... the critical factor in establishing a jurisdictional standard should be, as it always has been, the effect which a stoppage of an employer's operations by industrial strife would have upon commerce."

In the newspaper industry the Board asserted jurisdiction over a newspaper company which had a $2,406,564 annual gross volume of business. This amount was well in excess of the required $500,000 minimum. The Majority explained that this standard was based upon "their

103 Ibid., p. 557.
105 Ibid., p. 1260.
106 Ibid., p. 1263.
evaluation of administrative experience and applicable studies. They stated that the "efficacy" of the present standard would "... be found in the test of time and application and not in the prejudgments of our dissenting colleagues." The dissenting Board members "... would have one believe that ... our predecessors discussed the reasons in detail, supported their findings by documentation, and established beyond preadventure of doubt the wisdom of their action."

Members Peterson and Murdock, in their mutual dissent, emphasized that newspapers were instrumentalities of interstate commerce. Therefore, a dollar volume "test cannot and should not be applied in determining whether to take jurisdiction." They stressed that "small" and "local" were not synonymous or interchangeable when used in describing the impact of an employer's operations upon interstate commerce, especially in this particular area. In addition, this new standard overrulled past Board precedent. "Hence comes this figure and why $500,000 rather than $1,000,000 or $2,000,000 our colleagues of the majority alone know and they are not telling." In conclusion, they stated at best the Majority, in establishing this new standard, used a criterion which was naive and incorrect—the belief that large newspapers with large gross receipts have

108 Ibid., p. 576.
109 Ibid., p. 576.
110 Ibid., p. 576.
111 Ibid., p. 576.
112 Ibid., p. 584.
113 Ibid., p. 585.
an impact on interstate commerce, while small newspapers with smaller
dollar volumes of business have less of an impact. At worst, the Majority
was attempting to "administratively reallocate" to state governments
the Board's authority to regulate labor relations.

The substantive content of the public utility and transit system
jurisdictional standard remained unchanged during this period. The Major-
ity modified its policy in relation to applying the standard to local
gas and power utilities. The Majority declined to assert jurisdiction
over a local gas utility because the employer failed to meet the dollar
volume minimum. 114 He was engaged in the sale of natural gas. His gross
value of sales was $952,000, considerably under the dollar minimum re-
quired by the standard. The Majority elaborated upon their defense of
the revised standard. According to their O.A.S.I. statistics the stand-
ard would cause the "elimination of 50% of the units (local services and
public utilities) which would result in an elimination of only 4% of
the total employees (in these industries)."

The dissent once again questioned the basis for the revised
standard. For it was in conflict with nineteen years of past Board
policy in this area. Mr. Murdock and Mr. Peterson believed that the
new standard appeared to be based "upon the undocumented assumption that
large utilities in terms of gross receipts have an impact on interstate
commerce which smaller utilities do not." 115 They noted that the fallacy
of the small vs. large gross receipts judgment was obvious. "... it

115 Ibid., p. 568.
will result in taking jurisdiction of some utilities all of whose customers are residential rather than industrial, while denying jurisdiction to a substantial number of industrial customers. Mr. Murdock and Mr. Peterson used Federal Power Commission statistics to point out that 79% of the total number of electric utility companies in the United States will fall outside the $3,000,000 requirement. Is the effect upon commerce of industries which are dependent on power of a cessation of such power any different because they happen to be located in a community whose utility has only $1,000,000 in gross revenue rather than $3,000,000? The fact that a given utility may have only 50 employees simply cannot be an indication of the importance of that utilities operations to the industries it serves or any fair gauge of the impact upon commerce (resulting) from a work stoppage. In concluding they noted that the revised standard overrules several past Board decisions in this area.

116 Ibid., p. 569. Brooklyn Borough Gas Co., 110 NLRB 18 (1954). In this case the Majority asserted jurisdiction because the company's gross annual sales were in excess of $4,000,000. Yet all of his customers were residential living within the state of New York.

117 Ibid., p. 569.

118 Ibid., p. 569.

119 Ibid., p. 570.

120 Gibson County Electric Membership Corp., 65 NLRB 670 (1945); Graham County Electric Cooperative, 96 NLRB 684 (1951); Cherokee County Rural Electric Cooperative, 92 NLRB 1181 (1950); Black River Electric Cooperative 98 NLRB 539 (1952). Note that standard is in direct conflict with Supreme Court decision in Amalgamated Assoc. of Street Railway & Motor Coach Employees v. Wisconsin Employment Relations Board, 340 U.S. 383-391 (1951). There shall be no distinction drawn between public utilities and national manufacturers. Creation of a special classification for public utilities is for Congress to decide, not the Courts.
The Majority modified their policy in the application of the revised standard in relation to wholesale electric cooperatives. They would assert jurisdiction. They believed that the differentiation was necessary because retail electric cooperatives "customarily and traditionally" served the consuming public. Wholesale cooperatives traditionally served other industries. In applying the standard to the taxi-cab industry, the Majority overruled the past policy governing this industry. Their basis for the alteration was that this particular type of public transportation was "local" in the nature of its operations. In addition, a taxi company usually served a single community. Therefore, in the future the Board would not assert jurisdiction over this industry. They further stated that this new policy governing the taxi industry would apply in the Territories of the United States, despite the Board's past policy of asserting plenary jurisdiction in these special areas.

The Majority's policy in applying the public utility and transit standard to an interstate transit system, was based on contradiction. They specifically noted that they would not attempt an interstate-intrastate dichotomy of a public transit system. Yet this dichotomy was evidenced in this decision. In justifying their application of the policy the Majority said that it could not separate.

122 Checker Cab Co., 110 NLRB 683 (1954); overruled Cambridge Taxi, see footnote 29.
123 Union Cab Co., 110 NLRB 1921 (1954).
into two mutually exclusive categories—that is to say (1) wholly intrastate and (2) wholly interstate carriers. Therefore, this Board has attempted to devise and apply a standard which makes jurisdiction attach where the interstate aspect of the business is truly substantial .... The dissent, however, would have us assert jurisdiction even when the interstate part of a transit company is a small feeder line and the bulk of the business is intrastate. Such a tail wagging the dog proposition ignores the basic premise of both the 1950 and the present standards that the impact on interstate commerce be substantial.\textsuperscript{124}

The Members Murdock and Peterson, in dissenting, noted that there had never been dollar minimums for instrumentalities of interstate commerce, because such businesses constituted interstate commerce.

The incongruity of this particular standard is pointed up vividly by the fact that under the new jurisdictional plan a factory which ships $50,000 in value of goods across a state line is sufficiently engaged in interstate commerce to warrant assertion of jurisdiction. The trucking company which actually transports these goods across State lines is held not to be sufficiently engaged in commerce to warrant assertion of our jurisdiction because it receives $99,000 in cartage fees for such services. This, we believe, is both anomalous and self contradictory.\textsuperscript{125}

The present Majority's accusation that past Board policy attempted a dichotomy between intrastate and interstate commerce was ironical. "The actual fact, of course, is that, until the creation of this current group of standards, the Board made no attempt to divide its jurisdiction over transportation on the basis of clearly interstate and clearly intrastate lines."\textsuperscript{126} This controversy over the usefulness of an intrastate vs. intrastate...
interstate commerce dichotomy in relation to public transit systems continued up until Mr. Leedom's appointment as Chairman of the Board. 127

There was no change in the substantive content of the multistate enterprise jurisdictional standard.

The Majority asserted jurisdiction over an employer whose company represented an integral part of a multistate enterprise. He was engaged in the manufacture of dental supplies. 128 His home office was located in Ohio, but he maintained branch plants in Indiana, Michigan, and California. He shipped goods valued in excess of $250,000 from the California and Ohio plants to points outside of these two states.

Member Murdock was in full agreement with the Majority's assertion of jurisdiction. He felt the $250,000 minimum was unnecessary in that the Board should assert jurisdiction over any establishment operating as an integral part of a multistate enterprise. He emphasized that the character of any multistate enterprise was implicitly interstate. He noted that the Majority had failed to develop any form of a combination inflow-outflow standard in regard to this type of enterprise, so as to be cognizant of the greater impact of its operations upon the flow of interstate commerce as compared to the operations of a single intrastate enterprise.

127 Elden Transfer and Storage Co., 110 NLRB 1881 (1954); Charleston Transit Co., 111 NLRB 1214 (1955); Safeway Transit Co., 111 NLRB 1232 (1955); Tanner Motor Tours, 112 NLRB 275 (1955).
If a firm in N.Y. state ships $50,000 worth of goods in interstate commerce, the Board will assert jurisdiction. Another firm owns and operates plants in four different states. Each of these plants does $45,000 in direct outflow and $95,000 in indirect outflow. Since not one of the four plants individually meets the $50,000 or $100,000 standards the Board would not assert jurisdiction over any one of the plants. But one would assume that the Board would assert jurisdiction under this—the multistate standard. This unfortunately is not the case.

While the four plants . . . each meet 90% of the $50,000 direct outflow standard for individual plants, their combined $180,000 of outflow is only 76% of the $250,000 direct outflow standard for multistate enterprises. While the $95,000 in indirect outflow at each plant is 95% of the $100,000 minimum for individual plants, the combined total of $380,000 is only 38% of the $1,000,000 indirect outflow standard for multistate enterprises. Yet the total direct or indirect outflow of this multistate enterprise whose lines of ownership and control cross State lines is many times the outflow of the single N.Y. plant over which my colleagues would assert jurisdiction . . . . To say that this is illogical is to understate the case,129

Mr. Murdock stated that when this same analysis was applied to the retail standards the height of absurdity and absence of logic becomes apparent in relation to a logical consideration of impact of an employer's operations upon interstate commerce. However, the Majority continued to apply this policy throughout the remainder of Mr. Farmer's term as Chairman.130

The Majority modified its jurisdictional policy in relation to their direct outflow jurisdictional standard. The substantive content of the standard remained unchanged prior to Mr. Leedom's chairmanship. The Majority refused to assert jurisdiction over a company operating a mailing
service in Detroit, Michigan. Advertising and other printed materials were furnished to the company by its customers. The company maintained its own mailing list. The dollar value of the customer's materials used by the company was in excess of $200,000 annually. The company received $48,000 annually from its customers for their services. The company mailed the materials under a postal permit in the customer's name. The customer was required to keep a deposit at the post office to cover mailing costs. If the account was short, the company advanced the necessary money and was then reimbursed by the customer. The area to be covered by the mailing service was determined by the customer. Specific addresses were provided by the company from its private mailing list. The Majority refused to assert jurisdiction because the mail was not shipped out of the state by the company within the meaning of this standard. "Implicit in the current direct outflow standard . . . in order to qualify as the shipper of the goods produced or handled, the enterprise involved and not some other entity must determine the destination of the goods shipped." They further stressed in that the company and not the area determined the specific addresses for the receipt of the printed advertising materials, it could not be construed as the shipper.

The dissent by Mr. Peterson and Mr. Murdock stated that the Majority should have asserted jurisdiction under the direct outflow standard. For the company received nearly $50,000 for services rendered upon goods valued at $200,000 that were to be directly shipped in interstate

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131 Reliable Mailing Service, 113 NLRB 1263-1266 (1955).
132 Ibid., p. 1265.
commerce. They emphasized that the implicit new requirement of the Majority's bore no relationship to measuring the impact of an employer's operations upon interstate commerce. In addition, they explained that regardless of the logic of the new requirement, the company in this particular case fulfilled this additional requirement. The company determined the destination of the goods by a private mailing list. They were puzzled as to how the Majority finds that the customer:

"determines the destination . . . even though he doesn't know specifically where or to whom the materials are addressed and delivered. We find great difficulty in discharging our responsibilities . . . where simple words like 'ship' and 'destination' are given esoteric meanings totally at variance with the ordinary meaning of the words. Furthermore, we are at a loss to understand this reoccurring straining to arrive at interpretations which result in dismissals of cases where jurisdiction would otherwise be asserted."

Ignoring this dissent the Majority continued to apply this standard in an 'esoteric' manner throughout the duration of Chairman Farmer's term.

The substantive content of the indirect outflow jurisdictional standard was subjected to an extremely restrictive interpretation by the Majority. In addition, the substantive content of this standard was modified. The Jonesboro Grain Drying Cooperative case provided the vehicle for these changes. The employer was engaged in the business of drying and storing rice in the town of Jonesboro, Arkansas. "Connected by a spout to the (company's) dryer is a mill owned and operated

133 Ibid., p. 1266.
134 Central Valley Pipe Co., 111 NLRB 233 (1955); Homer Chevrolet Co., 110 NLRB 825 (1954).
135 110 NLRB 481-492 (1954).
independently by the Arkansas Rice Growers Cooperative Association, an enterprise concededly engaged in interstate commerce."\(^{136}\) All of the rice handled by the employer is sold directly to the Association, seventy-five per cent of which is then sold in interstate commerce."\(^{137}\) The employer received between $75,000 and $90,000 per year from the Association for drying and storing the rice. The Association sales in interstate commerce annually exceeded $1,000,000. The Majority refused to assert jurisdiction because the employer performed the drying services for the farmer, not the Association.

Having settled the particulars of the case, the Majority proceeded to elaborate upon several of the revised jurisdictional standards as announced in their formal press release of July 15, 1954. The direct outflow standard was modified. In the future the Majority would assert jurisdiction over "an enterprise which produces and ships such goods out of state or performs services outside the State in which the enterprise is located, valued at $50,000 or more."\(^{138}\) The Majority would assert jurisdiction under the indirect outflow standard in the future when

"an enterprise which furnishes goods or services to other enterprises and that (a) such goods and/or services are directly utilized in the products or services of the other enterprises and are valued at $100,000 or more; or (b) such goods and/or services regardless of their use, are valued at $200,000 or more. . . . We have further determined that unless an employer's volume of operations meets one of the Board's new independent jurisdictional standards, we will not accumulate those standards

\(^{136}\) Ibid., p. 480.

\(^{137}\) Ibid., p. 482.

\(^{138}\) Ibid., pp. 483-484.
in order to assert jurisdiction.\textsuperscript{139}

In his dissent, Mr. Murdock observed that the Majority evidently did not understand the purpose of a "lead" case.

It (this case) is not confined to the normal role of a lead case in announcing in decisional form and explicating the new jurisdictional standard which is involved in the case . . . . Instead (this case) has been converted into a receptacle into which has been dumped six separate jurisdictional standards, at least four of which have absolutely nothing to do with this case.\textsuperscript{140}

He noted that the Majority failed to explain why the phrase "and ship such goods out of state" was added to the direct outflow standard. They did not indicate if this addition was to modify the standard as expressed in the formal press release. Mr. Murdock asked the Majority for an explanation of the addition of the $200,000 minimum to the indirect outflow standard. It appeared to be in direct conflict with the intent of the standard, in that it bore no logical relationship to determining impact upon interstate commerce. Finally, he noted that in this particular case the Majority never explained which standard applied. " . . . It is evident that such a work stoppage (by the employer) could prevent the shipment of as much as $1,000,000 in rice in interstate commerce. The Majority apparently views this sum as insignificant."\textsuperscript{141}

The Majority modified the substantive content of the multistate

\textsuperscript{139} Ibid., p. 484.

\textsuperscript{140} Ibid., p. 487.

\textsuperscript{141} Ibid., p. 492.
chain jurisdictional standard in the case of Reeves & Sons, Inc. The company, located in Pecos, Texas, produced and mined sand, gravel, and concrete aggregate. In addition, it sold ready mixed concrete. In 1954 the firm's New Mexico plant sold $141,800 of these various materials to contractors engaged in the construction and repair of roads in and around Roswell, New Mexico. The Majority would not assert jurisdiction for two reasons. The contractors did not directly utilize these materials in interstate commerce. Secondly, the company failed to meet the $200,000 indirect utilization modification.

Member Murdock, dissenting, noted that the $200,000 indirect utilization modification did not appear in the Majority's formal announcement of the revised jurisdictional standards. He did not understand the need for this modification.

(The material was used by the contractor) in the paving and construction of streets and roads which are part of the State highway system. I would have thought that such things as ready mixed concrete used in road building are inescapably 'directly utilized' in the highway, and the $100,000 would therefore apply.143

The Majority ignored the dissent and continued to decline jurisdiction on the basis of this modification throughout the remainder of Mr. Farmer's Chairmanship.144

142 111 NLRB 186-188 (1955).
143 Ibid., p. 188.
The Majority attempted to clarify its policy of applying the multistate chain standard to general or public office buildings in the McKinney Avenue Realty Co. case.\textsuperscript{145} The company is engaged in operating the City National Bank Building, a 24-story office building located in Houston, Texas. The building is occupied by 126 tenants who pay rent in excess of $1,000,000 per year.\textsuperscript{146} The Majority noted that more than one-half of the building was rented by tenants who admitted to being engaged in interstate commerce. They stated that "in light of changing economic conditions" plus a "study and reappraisal" of the past standard governing this area, "we" have decided to "revise" the Comax decision.\textsuperscript{147} "We have determined that in future cases the Board will assert jurisdiction over an office building operation only when the employer which owns or leases and which operates the office building is itself otherwise engaged in interstate commerce and also utilizes the building primarily to house its own offices."\textsuperscript{148} Therefore the Majority refused to assert jurisdiction in this case because the employer did not use the building to house his own offices and therefore was not engaged in interstate commerce.

Member Murdock developed a long and detailed dissent concerning the logic of the Majority's attempted clarification.

\textsuperscript{145} NLRB 546 - 554 (1954).
\textsuperscript{146} Ibid., p. 548.
\textsuperscript{147} Comax, Inc., 94 NLRB 1150 (1951). In this case the Board decided to assert jurisdiction over any office building whose tenants paid rent individually in excess of $50,000 annually.
\textsuperscript{148} McKinney Avenue Realty Co., see footnote 145, p. 549.
To separate interstate activity of the tenants from the situs of that activity is unrealistic. The only way the Board could do this was to consider that enterprises are engaged in interstate commerce only when physical articles are being produced. But this approach would be patently myopic. The fact that the tenants of the employer are engaged in clerical rather than production operations does not alter the fact such activities are just as integral a part of the interstate commerce operations of these tenants as those performed by the rest of their employees.

He felt that the Majority's judgment that the employer must utilize the office building to house his own offices was illogical in relation to determining impact upon interstate commerce. Whether the owner or lessor maintained offices in the building would in no way affect the actions of the employees that worked there. In following this line of reasoning, Mr. Murdock noted that the Majority would assert jurisdiction over a small employer who happened to use a large part of an office building for his own business. Yet they would refuse jurisdiction over the Empire State Building or other buildings housing tenants doing millions of dollars of business in interstate commerce, merely because the owner or lessor does not maintain offices there. The incongruity of the situation is immediately apparent. It is basic in an approach which attaches supreme importance to the superficial 'localness' of activity and refuses to observe the effect of that activity upon commerce.

The Majority applied an 'esoteric' interpretation to the substantive content of the direct inflow jurisdictional standard in terms of its

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149 Ibid., p. 552.
150 Ibid., p. 553.
151 Ibid., p. 553.
relation to measuring the impact of an employer's operations on inter­
state commerce. In the Kenneth Chevrolet Co. case, the employers oper­
ated retail auto sales and service dealerships. Their total annual
purchases directly from outside of the state did not exceed $500,000.
Although each dealer purchased over $1,000,000 worth of new autos annu­
ally, delivery of all of these autos with one exception was "taken from
assembly plants located within the state." Therefore, the Majority
did not assert jurisdiction because the employers failed to meet the
direct inflow standard. The form of their purchases changed after enter­
ing the state. "The flow is stopped when the form is materially altered
..." Member Murdock in dissenting states, "The Board's interpretation
is strained and unrealistic ... It is an extreme one akin to archaic
views of interstate commerce long since discarded by the courts. Its
failure to reflect the essentially interstate nature of many transactions,
such as these herein, is obvious." No cases arose following the revision of the 1950 standards,
which called for the Board's application of the indirect inflow jurisdic­
tional standard. Therefore its substantive content remained unchanged.
The Majority significantly modified its policy of applying the
retail stores jurisdictional standard. In the Hogue & Knott Supermarkets

\[152\] NLRB 1615 – 1617 (1954).
\[153\] Ibid., p. 1615.
\[154\] Ibid., p. 1616.
\[155\] Ibid., p. 1617.
case they decided to combine the stores' direct and indirect inflow in
declining jurisdiction. The employer operated two supermarkets within
the state of Tennessee. In 1953, his direct and indirect dollar volume
inflow totaled $1,474,020. The Majority would not assert jurisdiction
because this figure failed to meet the $3,000,000 total of the $1,000,000
direct inflow minimum and the $2,000,000 indirect inflow minimum. How­
ever, in the future the Majority decided to total the dollar minimums of
an employer's direct and indirect inflow and direct outflow in determin­
ing jurisdictional questions in relation to intrastate retail chain
stores. In the case of a multistate chain retail store, they would as­
sert jurisdiction over the individual store using the same combination
method. However, in relation to the assertion of jurisdiction over an
entire multistate chain, the $10,000,000 gross sales minimum would con­
tinue to apply.

Member Murdock, in dissenting, indicated that the Majority of­
fered no evidence or basis for this modification.

Our colleagues seem to view a retail store as bearing the hall­
mark of local enterprise . . . . The incongruities lurking in
this formula are legion. If we are right in reading the Ma­
jority's opinion as placing prime emphasis on the individual
store, then why do they abandon that end of the telescope for
the other once the magic figure of $10,000,000 in gross sales
is reached in the case of the chain.

\[156\] 110 NLRB 543-547 (1954).

\[157\] Ibid., p. 547.
As a result of this dissent, the Majority slightly modified their interpretation in relation to the direct, indirect inflow, plus direct outflow combination application. But they maintained their earlier rationale of equating small with local in applying the retail standards to retail auto dealers operating under franchise arrangements with large automobile manufacturers.

158 Greenberg Mercantile Corp., 112 NLRB 710 (1955). The Majority decided that they would total the dollar minimums of an employer's direct, indirect inflow and direct outflow in considering all of the branch outlets of a retail chain operating within a state. They would no longer consider single branch stores of a multistate chain, when there were more than one located within a state.

159 Wilson Oldsmobile Co., 110 NLRB 534-542 (1954). The Majority stated that it would no longer use the Board's past 'franchise yardstick' in determining jurisdiction. In the future retail automobile dealers would be subject to the modified retail standards as announced in the Hogue and Knott Super Markets case. Member Murdock in his dissent adamantly emphasized the Majority's complete denial of past Board and court policy in this area. The basis of the Majority's future assertion of jurisdiction over retail automobile dealers was that they constituted independent businesses. The Board in the past had rejected this contention in the following cases. Newton Chevrolet, Inc., 37 NLRB 334 (1941); Liddon White Truck Co., Inc., 76 NLRB 1181 (1948); Puritan Chevrolet, Inc., 76 NLRB 1263 (1948); Lewiston Buick Co., Inc., 77 NLRB 375 (1948); J. C. Lewis Motor Co., Inc., 80 NLRB 1134 (1948); Adams Motors, Inc., 80 NLRB 1518 (1948); Midtown Motors, 80 NLRB 1679 (1948); Harry's Cadillac-Pontiac Co., 81 NLRB 1 (1949); W. L. Townsend, 81 NLRB 739 (1949); Kaljian Chevrolet Co., 82 NLRB 978 (1949); Scott Motor Co., 84 NLRB 129 (1949); Channel Motors, 84 NLRB 353 (1949); Lundahl Motors, Inc., 85 NLRB 224 (1949); Wm. J. Silva Co., 85 NLRB 573 (1949); B. E. Burns Co., 85 NLRB 1025 (1949); Butte Motors, 85 NLRB 1336 (1949); Granger Motor Co., 86 NLRB 336 (1949); Jos. W. Fournier, Rome Lincoln-Mercury Corp., 86 NLRB 397 (1949); Harry Brown Motor Co., 86 NLRB 652 (1949); L. C. Beauchamp, 87 NLRB 23 (1949); Reelink and Wiggers Motors, 87 NLRB 126 (1949); Allbritten Motors, Inc., 87 NLRB 193 (1949); Bill Daniels, Inc., 88 NLRB 572 (1950); Riehmeyer Motor Co., 88 NLRB 814 (1950); Masters Pontiac Co., Inc., 88 NLRB 932 (1950); Grace Motor Sales, 88 NLRB 428 (1950); Bill Heath, Inc., 89 NLRB 67 (1950); Howell Chevrolet Co., 89 NLRB 1189 (1950); University Motors, 89 NLRB 1224 (1950); Sheley Motor Sales Co., 89 NLRB 1376 (1950); Baxter Brothers, see footnote 32; Conover Motor Co., 93 NLRB 867 (1951); Harbor Chevrolet Co., 93 NLRB 1326 (1951); Howell Chevrolet Co., 95 NLRB 410 (1951).
The Majority altered the substantive content of their announced policy concerning the restaurant industry. The basis of their alteration was a similarity between this industry and the retailing industry. In the Bickford's, Inc. case, the employer operated a multistate restaurant chain which received gross sales on a yearly basis in excess of $10,000,000.

In these instances, restaurants are markedly similar to retail selling establishments .... Clearly then the broad operations of Bickford's compares to a single locally owned restaurant as does a large multistate retail selling chain to a single corner store. In view of the similarities between a restaurant and a retail store, no better rule could be devised for distinguishing between essentially local restaurant activities and those having a substantial impact upon interstate commerce, than that announced recently for the retail selling industry. 160

The Majority asserted jurisdiction.

Members Peterson and Murdock, in dissenting, believed the analogy between restaurants and retail enterprises to be proper. But it had little bearing on the question of the Board's legal jurisdiction over restaurants. The Majority had not yet established a reason for "distinguishing between the effect caused by a halt of shipments to and from a retail enterprise and those to and from most other enterprises of a

California Willys, 98 NLRB 325 (1952); Louis Rose Co., 99 NLRB 690 (1952); Bishop McCormack and Bishop, 102 NLRB 1101 (1953); A. E. Rogers Co., 103 NLRB 1247 (1953). The courts also rejected the contention. NLRB v Ken Rose Motors, Inc., 193 F.2d 769 (C.A. 1); NLRB v Somerville Buick, Inc., 194 F.2d 56 (C.A. 1); NLRB v Ray Brooks, 204 F.2d 899 (C.A. 9); NLRB v Conover Motor Co., 192 F.2d 799 (C.A. 10); NLRB v Davis Motors, Inc., 192 F.2d 782 (C.A. 10). In concluding Mr. Murdock noted, "we are not dealing here with a few scattered 'corner stores' but with a sixteen billion dollar industry with hundreds of thousands of employees." Wilson Oldsmobile Co., p. 542.

Controversy arose among Board members over the substantive content of the national defense jurisdictional standard. The Majority initially applied the standard in the Maytag Aircraft Corporation case. The employer was engaged in refueling of military aircraft at Ellington Air Force Base, Houston, Texas. He was under government contract. His annual receipts for this service amounted to $195,000. The Majority asserted jurisdiction because the employer fulfilled all three requirements of the standard.

Member Murdock concurred in the assertion of jurisdiction. However, he was interested in the Board's reasoning in the development of this revised standard. "In the past... The Board has not considered itself equipped with the specialized knowledge necessary to declare any enterprise active in the national defense field to have only an 'insubstantial role' in that program." He noted that the Board was not aware in the past, and the Majority was not aware now, of how much vital equipment was produced in plants doing less than $100,000 business per year or how much of the equipment was produced under government contract. In addition, the Majority cannot determine the importance of the impact of the employer's business upon our defense effort from interruptions in his services and goods which support the defense effort. In an earlier case,

161 Ibid., p. 1907.
162 110 MLRB 594-602 (1956).
163 See national defense standard, p. 32.
164 Ibid., p. 599.
of the Thomas Rigging Co., 102 NLRB 65 (1950), the employer received $52,000 for installing $1,500,000 worth of equipment used in manufacturing 81 mm. mortar shells for the Korean War.

The critical assumption of the Board in establishing this new standard is that any employer which fails to meet the three new criteria will not substantially affect our defense effort. On what facts, statistics, data, study, research or expert knowledge does it rest? The Majority opinion offers no answer.165

The Majority paid no heed to the dissent. They continued to assert jurisdiction under their revised standard.166

The Majority did not alter the jurisdictional policies, in reference to the "hotel industry" and the "projection of financial data," by an employer appearing before the Board.167 However, controversy between the Majority and Members Peterson and Murdock continued in relation to the Board's jurisdictional position in reference to educational institutions and non-profit organizations. In the Massachusetts Institute of Technology, Lincoln Laboratory case the Majority asserted jurisdiction.168 The laboratory was engaged in a defense project for the government under contract. "Over the past year the Project utilized over $2,000,000 worth

166 Virgin Isles Hotel, 110 NLRB 558 (1954). The Board refused to assert jurisdiction over hotels as an industry, in the territories. Mr. Murdock vigorously dissented pointing out that the Board in the past had always asserted plenary jurisdiction in the District of Columbia and territories. See footnote 38.
168 110 NLRB 1611-1614 (1954).
of materials, 15-20% of which came directly from outside the Commonwealth of Massachusetts. The Majority noted that the Laboratory's activities outside of the Project were broken down as 93% government; 4% private industry; and 3% non-profit or educational.

Members Farmer and Rodgers dissented on the grounds that the Laboratory constituted a non-profit educational organization. To support their argument they quoted the legislative history of the non-profit hospital exemption contained in Section 2 (2) of the Labor Management Relations Act. Their conclusion was that Congress defined "purely commercial" activities as those sponsored by or which were for the benefit of private industrial concerns. Therefore, in that this case was concerned with a government contract, jurisdiction should be declined by the Board. Member Murdock questioned the applicability of Section 2 (2) to this particular case.

Post-1955 and the Development of a "No Man's Land"

Procedural Changes in Board Policy.—The Board's membership changed when Mr. Leedom was appointed chairman. However, the Republican majority remained intact. The restrictive standards and policies of the previous Board were liberalized during this period so as to effect an extension of Board jurisdiction.

169 Ibid., p. 1612.
170 Ibid., pp. 1613-1614.
No cases appeared before the Board concerning the instrumentali-
ties and channels of interstate commerce jurisdictional standard. The
public utilities and transit system jurisdictional standard, as applied
to local public utilities remained unaltered. Its application to intrastate transit systems was modified in the Potash Mines Transportation Co., Inc. case. The employer was engaged in the operation of a bus company within the state of New Mexico. He had a contractual arrangement with the Potash Company of America to transport its employees to and from the company's mine site. He received in excess of $100,000 annually for providing this service. The employer's operations fell short of the $3,000,000 minimum required for the Board's assertion of jurisdiction.

However, as this Employer renders its services to the companies by virtue of a contractual arrangement and does not transport members of the general public during its trips between the city of Carlsbad and the mine site, and as 95% of its gross annual revenue is derived from transporting employees of the Potash Company of America to and from the mine site, it is apparent that this Employer's operation resembles more closely those of a charter system than those of a public transit system... (The Board will assert jurisdiction) as the Employer renders service valued in excess of $100,000 to a company which ships goods outside the state of New Mexico in excess of $50,000...

In the Charleston Transit Co. case the Majority stated that their action in the Potash Mines Transportation Co. case was not to be construed as a precedent in relation to future jurisdictional policy.

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172 Gary Hobart Water Corporation, 115 NLRB 1575 (1956); Butte Water Co., 117 NLRB 484 (1957).
173 116 NLRB 1295-1297 (1956).
174 Ibid., p. 1296.
governing intrastate public transit systems. The controversy in this case centered around the intent of a court order concerning the $3,000,000 minimum. The Majority's position was that the court order asked them to reconsider the retroapplication of the standard in this particular case. They cited the court's words in support of this contention.

"Here (in the original case) the Board dismissed the complaint solely by reason of a standard established in the Greenwich Gas case . . . . These criteria were applied to the present case after the issuance of the complaint and after conclusion of the hearings before the trial examiner. In these circumstances we think that the Union should have been heard on the validity of these standards, as applied to this case."

The Majority did not believe that an oral hearing was necessary to determine the necessity of a retroactive application of the standard. Therefore, they asked the union to file a written brief. They concluded by stating that the Potash Mines Transportation Co. case was not to be construed as a modification of the indirect outflow standard or as a modification of the local public utilities jurisdictional policy. Having reviewed the Union's brief as to why the $3,000,000 minimum gross sales limitation was restrictive, the Board declined to assert jurisdiction over this company.

Member Murdock's dissent emphasized the Majority's misinterpretation of the court order. He maintained the court ordered the Board to reconsider the validity of the $3,000,000 minimum.

175 118 NLRB 1164-1177 (1957).

176 Ibid., p. 1165-1166. As quoted from the case of Amalgamated Association v NLRB 238 F.2d 38 (1956), p. 38. For the original Charleston Transit case see footnote 127.
In its brief to the court, in support of its petition for review, the Union states the questions presented to the court as follows:

1. Whether the Board has jurisdiction under Act of the Constitution of the U.S. over the operation of the Intervenor (the Employer herein).

2. Assuming the Board has jurisdiction over the Intervenor's operations, whether in the establishment of the new jurisdictional standards for the transit industry, on the basis of which the Board refused to assert jurisdiction over the Intervenor, the Board acted contrary to law and abused and exceeded such discretion as it might have to limit its jurisdiction.

In its brief to the court the Board agreed with the Union's statement of the questions presented; stating, 'The questions presented were formulated in the pre-hearing conference stipulation and are correctly set forth at the outset of the Petitioner's (union's) brief.'

Therefore, it appeared to Mr. Murdock that the Majority and Union agreed that the point of controversy was the subjective content of the standard, not its retroactive applicability. In summation Mr. Murdock states:

Neither the parties, the court nor the public is told why gross receipts is the sole test—a test which does not take into account at all, impact on commerce which is customarily measured in terms of inflow, outflow, or services rendered to firms which are engaged in commerce; nor why the standard announced for a gas utility is equally appropriate for a transit utility.

No cases appeared before the Board in relation to its application of the non-retail multi-state enterprise jurisdictional standard to companies forming integral parts of such enterprises. In applying the standard to non-retail multistate enterprises with gross volumes of sales

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177. Ibid., p. 1170-1171.
178. Ibid., p. 1176.
annually in excess of $250,000, the Board reversed an earlier decision in the case of Orkin "The Rat Man," Inc. Its grounds for the revision were that in the present case there was a greater degree of common operation exhibited than in the former case. A second case questioned the validity of the $250,000 minimum in measuring the impact of an employer's operations upon interstate commerce. In the Dixie Coca Cola Bottling Co. case the employer was engaged in bottling and distributing coca cola in the states of Virginia and Tennessee under a franchise arrangement. Its direct inflow was $218,910 per year. Its direct outflow was $234,493 per year. Neither of these figures individually met the $250,000 minimum requirement for the Board to assert jurisdiction. Therefore, the Majority refused to assert jurisdiction.

Members Murdock and Peterson in dissenting were concerned by the absence of logic in the $250,000 minimum requirement.

Absurd as it is and incredible as it sounds, it is nonetheless true that the majority is finding that it will not effectuate the policies of the Act to assert jurisdiction in this case on the ground that the Employer's operations are interstate rather than intrastate. The Board would assert jurisdiction if the Employer had a single plant in a state which had a direct outflow of $50,000. But if the employer's enterprise is in two or more states, then it must do $250,000 instead of $50,000 in order to receive Board protection. Surely the latter situation is what is truly termed interstate commerce than the former, yet it is protected less than the former situation. What kind of sense does that make?181

In concluding their dissent they expressed a sympathy for the Majority

180 116 NLRB 312-317 (1956).
181 Ibid., p. 314-315.
having to defend the rationale of the 1954 standards. "The paradoxical logic is so ridiculous that the Board is naturally embarrassed in attempting a defense. But why does the Board continue to treat . . . these standards as perfectly whole and immutable . . . ." 182

The Board did not consider any cases that required the application of the direct outflow jurisdictional standard. It modified the substantive content of the indirect outflow jurisdictional standard in the Whippany Motor Co. case. 183 The Board stated that,

"Since the issuance of that decision (the one introducing the standard) in 1954, experience has shown the general impracticability of testing on a case by case basis, the precise type of utilization (direct or indirect) by a purchaser . . . . We have therefore decided to abolish the distinction between direct and non-direct utilization of goods and services and will henceforth assert jurisdiction on the basis of the indirect outflow test . . . wherever the sales total $100,000 annually without regard to the manner in which purchasers make use of the goods or services." 184

Member Murdock welcomed the change in concurring with the Board's decision, as a " . . . step in the right direction and if it accomplishes no more than eliminating one of the areas of confusion and complexity under the 1954 standards, it helps to meet an important need." 185 The Board continued to use the new modification in later cases. 186

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182 Ibid., p. 317.
183 115 NLRB 52-55 (1956).
184 Ibid., pp. 53-54.
185 Ibid., p. 55.
186 Horse Brothers, 118 NLRB 1312 (1957); Pagan Motor Freight, Inc., 116 NLRB 1568 (1956); Shaver Transfer Co., 119 NLRB 939 (1957).
A heated debate arose over the application of the non-retail multistate chain store jurisdictional standard to office buildings. In the *East Newark Realty Corporation* case, the company furnished industrial floor space, water, steam and electricity to its tenants. He annually received $725,000 for these services and $275,000 in rent from these tenants. Several of the tenants' business volume in interstate commerce annually exceeded $50,000. The Majority refused to assert jurisdiction:

The instant case presents the question whether ... (the McKinney Avenue Realty Co. case) standard should be applied to industrial building enterprises. We conclude that it should ... here ... the Employer is also engaged in the essentially local operation of furnishing no more than space for the use of others. Even if steam, water, and electrical services could be 'disentangled' from the rest of the company's operation, it would fail to meet the $3,000,000 local utility standard ... applicable to such type of business.

Member Murdock in dissenting referred to his dissent in the *McKinney Avenue Realty Case* for the inadequacy of the application of this standard in measuring the impact of an office building owner's services upon the flow of interstate commerce. He noted that this defect would not be eliminated in applying the standard to industrial buildings. The Supreme Court in *Kirschbaum v Walling*, 316 U.S. 517 (1955) held that employees involved in jobs of producing steam, electricity, or water power for a building's tenants had such a close and immediate tie with the process of production for commerce and was therefore so much an

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187 115 NLRB 483-490 (1956).
essential part of it, that the employees are to be regarded as engaged in an occupation necessary to the production of goods for interstate commerce.\textsuperscript{189} "Yet our colleagues characterize these activities as an 'essentially local operation' . . . . Plainly an activity cannot be both, 'an essential part of interstate commerce' and 'essentially local.' If the Supreme Court's conclusion is right the Majority's conclusion is wrong.\textsuperscript{190} "If they (the majority members) are operating under the misconception that this Employer's fuel and power services make it a 'public utility,' the authorities are readily available to dispel such a misconception."\textsuperscript{191} The Majority ignored Mr. Murdock's dissent and continued to leave the policy application unchanged.\textsuperscript{192}

In the Rogers Lumber Co. case concerning the application of the direct inflow jurisdictional standard, the Board incorporated several changes in relation to the substantive content of the other 1954 jurisdictional standards.\textsuperscript{193} It felt that the previous Board in establishing and applying some of the standards " . . made the assertion of jurisdiction dependent upon the unit sought or the scope of the employer's operations involved in the proceeding and rejects the concept that it is the impact of the totality of an employer's operations on commerce that

\textsuperscript{189}Ibid., pp. 487-488. As quoted from pages 525-526 of the court decision.

\textsuperscript{190}Ibid., p. 488.

\textsuperscript{191}Ibid., p. 490.

\textsuperscript{192}John W. Galbreath and Co., 120 NLRB 625 (1958).

\textsuperscript{193}117 NLRB 1732-1736 (1957). The essence of the Board's action in this case was to eliminate the non-retail multistate, the non-retail multistate chain store, and the $10,000,000 minimum requirement for retail chain stores standards.
should determine whether the Board will assert jurisdiction in any proceeding involving the employer.\(^{194}\) It was this latter concept that had been accepted and applied by the courts.

(This dilemma could be corrected) by extending to multistate enterprises present standards applicable to single establishments and intrastate chains. Thus in this case and in the future we shall assert jurisdiction over all non-retail enterprises having one or more establishments where the enterprise has total direct inflow of $500,000 or more, total indirect inflow of $1,000,000 or more, total direct outflow of $50,000 or more, or total indirect outflow of $100,000 or more. Accordingly, in the future, we shall assert jurisdiction over all retail or service enterprises having one or more establishments where the enterprise has total direct inflow of $1,000,000 or more, total indirect inflow of $2,000,000 or more, total indirect outflow of $100,000 or more. We shall continue to apply the non-retail standards where—the Employer's business is combination retail and non-retail unless the non-retail aspect is clearly de minimis.\(^{195}\)

The Board began to effect this change immediately.\(^{196}\)

A question of jurisdiction policy arose in relation to interpretation of the retail stores standard as it related to stores meeting the $250,000 indirect inflow standard. The Board asserted jurisdiction over the Combined Century Theaters company because their indirect inflow was annually in excess of $2,000,000.\(^{197}\) This company operated an intrastate chain of thirty-five movie theaters. The film used by the theaters

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\(^{194}\) Ibid., p. 1735.

\(^{195}\) Ibid., pp. 1735-1736.

\(^{196}\) M.E. Moses Co., Inc., 117 NLRB 1769 (1957); Standard Furniture Co., 118 NLRB 35 (1957); Chock Full O' Nuts, 118 NLRB 156 (1957); T. P. Taylor & Co., 118 NLRB 1239 (1957); Miller Mercantile Co., 118 NLRB 8397 (1957); McAllister's Dairy Farms, Inc., 118 NLRB 1117 (1957); Emil Denemark, Inc., 120 NLRB 1059 (1958).

\(^{197}\) 120 NLRB 1379-1391 (1958).
was reproduced from a master negative. These reproductions were then sold to the theaters. However, the title of the reproduction remained with the distributor. Therefore, "What the distributor sells to the local exhibiter is not a film, but the right to reproduce a spectacle as it was created by the producer in California, the print or film simply being the means by which such reproduction is possible." 198

Members Leedom and Rodgers, in dissenting, pointed out that the master negative-reproduction print discussion was directly analogous to the Kenneth Chevrolet case where cars were assembled within a state.199 "... in both cases the difference is one of form and in both cases the product in its original form—a mass of auto parts or a negative film—is of no value to the prospective buyer ... until the local operation of assembling the auto or printing the positive has been completed." 200 Therefore, in that the form of the product was materially altered within the state, the $250,000 indirect inflow minimum was not applicable. The Board should have declined jurisdiction.

The Board reduced the $10,000,000 minimum gross sales requirement for interstate retail chain companies. This minimum was lowered to $3,500,000. 201 The Board continued to adhere to its original policy of applying the retail store standards to the restaurant industry. 202

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199 See p. 48.
201 *Coca Cola Bottling of New York, Inc.*., 114 NLRB 1423 (1955).
202 *C. R. Brown Cafeterias*, 115 NLRB 1772 (1956).
The national defense jurisdictional standard was slightly modified in the *Long Meadow Farms Cooperative, Inc.* case.\(^{203}\) The employer supplied milk under government contract to the Fort Bragg mess halls. All of his business was entirely within the state of North Carolina. He received in excess of $100,000 for his services to the army post. The Board asserted jurisdiction on the basis that "... the intended use or disposition of such food by the Armed Forces is immaterial."\(^{204}\)

**Revised Substantive Content of Formal Standards.**—On July 22, 1958, the Board announced proposed revised jurisdictional standards in a press release. It invited all interested comment and criticism. On October 2, 1958, in an additional press release and a series of six consecutive case decisions, the Board established new jurisdictional standards.\(^{205}\) The ten standards represented a simplification of the 1954 standards:

1. Non-retail companies which have a direct or indirect inflow or outflow of goods or services valued in excess of $50,000 per year;

"(This new standard) ... represents a telescoping of the multiple and varied outflow and inflow standards ... (This change is desirable) for basic reasons: (1) A labor dispute obstructs commerce to the same extent whether the movement of goods which is obstructed is to or from an employer's operations and (2) the Act accords the same importance and applies equally to operations which affect commerce and those which

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\(^{203}\) *115 NLRB 419-422 (1956).*


are directly engaged in commerce across State lines.  

2. Office buildings which have an annual gross revenue of $100,000 or more, of which $25,000 or more is derived from organizations which meet the other standards:

3. Retail companies which have an annual gross revenue of $500,000 or more:

"The Board has decided that it will assert jurisdiction over all retail enterprises . . . which do a gross volume of business of at least $500,000 per annum . . . . Determination of volume of inflow is time consuming in that many of the stores' records have to be analyzed. Gross volume is a more readily available figure."  

4. Instrumentalities, links and channels of interstate commerce which annually derive $50,000 or more from the interstate part of an enterprise or from services performed for an enterprise engaged in interstate commerce:

"The Board will assert jurisdiction over any enterprise which transports passengers or commodities in interstate commerce, or serves as an essential link in an interstate operation where its gross revenue is in excess of $50,000 per year."  

5. Public utilities which have an annual gross revenue of $250,000 or more or meet the requirements of the first standard:

By lowering the gross volume standard and applying the $50,000 direct, indirect, inflow outflow standard, the Board will be reasonably assured of asserting jurisdiction over all labor disputes involving local public utilities which exert a pronounced impact upon interstate commerce.

6. Public transit systems which have an annual gross revenue of $250,000 or more, except for taxicab companies which have an annual gross revenue of $500,000 or more:

7. Newspapers which have an annual gross revenue of $200,000 or more. Communications systems, radio, television and telephone, which have an annual gross revenue of $100,000 or more:

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209 Sioux Valley Empire Electric Assoc., 122 NLRB 92-94 (1958).
The Board will assert jurisdiction over cases involving newspaper companies which hold membership in or subscribe to interstate news services, or publish nationally syndicated features, or advertise nationally sold products, if the gross volume of business of the particular enterprise involved amounts to $200,000 or more per year.210 "(The Board will assert jurisdiction over) an enterprise engaged in the operation of radio or T.V. broadcasting stations, telephone or telegraph systems which do a gross volume of business of at least $100,000 per annum."211

8. Companies which have substantial impact upon national defense:

"(We will assert jurisdiction) over all enterprises . . . whose operations exert a substantial impact upon the national defense, irrespective of whether the enterprise's operations satisfy any of the Board's other jurisdiction standards."213

9. Plenary jurisdiction will be exercised in the District of Columbia. The standards will be exercised in the Territories.

10. Bargaining associations will be regarded as a single employer for purposes of the Board's jurisdiction.

Their reasoning for the revision of the standards was set forth in the Siemons Mailing Service case. The Guss decision by the Supreme Court made it imperative for the Board to readjust its standards, in order to lessen the problem of the no-man's land.213 Congress appropriated $1,500,000 specifically for the purpose of enabling the Board to extend its area of jurisdiction. The 1954 standards were so complex that far too much time was expended by the Board in determining the jurisdictional aspects of cases. Therefore, this revision represented an attempt to alleviate these problems.

The substantive content and the Board's application of the

213. See Chapter II, footnote 72.
non-retail direct-indirect inflow-outflow standard remained unchanged. In the Mistletoe Operating Co. case the Board overruled its previous policy governing office buildings. It felt that measuring the impact of an employer's operations upon the flow of interstate commerce was not dependent upon the fact that the employer provided maintenance and service functions necessary to the operation of a building as an incident of ownership or leasehold interest. Nor was the impact of his operations in any way affected by whether it was created by his tenants or himself.

The substantive content and Board's application of the rest of its jurisdictional standards remained unchanged. In May of 1959 the Board established a $500,000 minimum gross income requirement for the hotel industry. Its policy was to assert jurisdiction only over those hotels which did not have 75% or more of its guests remaining for a month or more. The Board made an addition to its policy governing the "projection of financial data" by an employer appearing before the Board. If the employer refused to provide the Board with data as to its interstate activities upon reasonable request, proof would be dispensed

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214 122 NLRB 1534 (1959), overruled McKinney Avenue Realty Co. See footnote 145.

215 Cab Services, Inc., d/b/a Red & White Airway Cab Co., 123 NLRB 83 (1959), applied the $500,000 taxicab standard. Charleston Transit Co., 123 NLRB 1296 (1959), applied the $250,000 transit industry standard. Overruled the original Charleston Transit case, see footnote 127.

with and the Board would assert statutory jurisdiction. Board members continued to disagree over the interpretation of its policy governing non-profit organizations and educational institutions. In lieu of section 14 (c) 2 of the Labor Management Reporting and Disclosure Act, they refused to assert jurisdiction over several entire classes of employers. In addition, a new procedure was instituted to facilitate processing of jurisdictional questions. Upon request the Board would render an advisory opinion as to the probability of asserting jurisdiction in a given case. However, to date, this procedure has not been widely used by unions or employers appearing before the Board.

Summary

Prior to the 1950 standards, the Board used an ad hoc approach in considering jurisdictional questions. It placed emphasis on dollar volume and flow of an employer's operations affecting the flow of interstate commerce. However, the Board failed to be consistent in its consideration of these two criteria prior to the formal standards.

The Board formulated the 1950 standards to achieve consistency.


218 Sheltered Workshops of San Diego, 126 NLRB 961 (1960); Bajac Enterprises, Inc., 126 NLRB 1281 (1960).

219 Flatbush General Hospital, 126 NLRB 144 (1960). The Board would not assert jurisdiction over private or proprietary hospitals. Hialeah Race Course, Inc., 125 NLRB 388 (1959); Jefferson Downs, 125 NLRB 386 (1959). The Board refused jurisdiction over race tracks.

220 Knoxville News Sentinel, 125 NLRB 672 (1959); Jackson's Party Service, 126 NLRB 875 (1960).
and clarification in its jurisdictional criteria and policies. It was careful to avoid ignoring its context in deciding jurisdictional questions by adhering to de minimis policy. This policy attached primary importance to the Board's consideration of the impact of an employer's operations upon the flow of interstate commerce. The Board used its accepted approach of a "lead" case in the introduction of each formal standard. It observed past precedent in the application of a standard to an industry.

In 1953 a "Republican Majority" lead by a new chairman, Mr. Farmer, initiated a drastic change in the Board's jurisdictional policies. They put forth various rationales in support of these changes. In 1954 they formalized the changes by revising the substantive content of the Board's 1950 jurisdictional standards. These changes were announced by a press release which ignored the Board's "lead" case approach. The changes consisted of destroying some of the original standards, increasing the complexity in the wording of the remaining standards, and adding some new standards. The Majority ignored the Board's de minimis policy in applying the revised standards. In many instances the substantive content and the policy of application bore no relationship to measuring the impact of an employer's operation upon the flow of interstate commerce. The Majority overruled much of the past Board precedent governing the particular application of a revised standard.

The Majority reconsidered their application of the revised standards between 1955 and 1958 under Mr. Leedom, the new chairman of the NLRB. They destroyed several complex interpretations and applications of the revised standards which had failed to observe the Board's de
**minimis** policy. In addition, they eliminated several of the revised standards which ignored the *de minimis* policy. In 1958 the Board introduced a revised set of jurisdictional standards. This change consisted of destroying several of the 1954 standards, while simplifying the substantive content in the remaining standards. The Board announced the standard's revision in a combined approach of press release and "lead" case. The Board failed to return to an observance of its past precedent in applying the standards.
CHAPTER II

ANALYSIS OF REASONS UNDERLYING DEVELOPMENTS
AND CHANGES IN BOARD POLICY

Pre-1950 Period of Ad Hoc Jurisdictional Standards

Definition Problems Regarding Legislative Intent.—The Board used no formally announced standards prior to 1950. It considered the dollar volume and flow of an employer's business affecting interstate commerce immaterial in determining jurisdictional questions. In defining what "affecting" commerce meant, the Board explained what was not intended by the term. A business whose activities were "local" in nature would not be covered by the Board. "Local" was to be defined in relation to the impact of the employer's operations upon interstate commerce, regardless of whether it was direct or indirect. Therefore, if a business had a small dollar volume operation, this was not a guarantee of immunity from Board jurisdiction. The critical factor was impact of the employer's operations upon the flow of interstate commerce.

In order to determine "impact" the Board employed an ad hoc case decision approach. This policy remained unaffected with the passage of the Administrative Procedures Act of 1946. A general overall statement

1 The term "flow" refers to direct or indirect inflow, direct or indirect outflow, in relation to an employer's business in interstate commerce.

2 Canyon Corporation, 33 NLRB 885 (1941); Coca Cola Bottling Co., 74 NLRB 1098 (1947).
which may be made in regard to the effect upon the existing procedures of the Board is that a majority of the provisions of the Act are found, upon analysis, to be in full accord with procedures which have long been part of its established practice. 3  "A horizontal analysis of the Act as it affects all agencies shows the limited nature of the actual change . . . . A vertical analysis of two agencies, the N.L.R.B. and the Immigration and Naturalization Service will show the Act's even more limited effect on actual agency practice." 4  The Board's ad hoc policy approach when coupled with its vague standards produced an effect on lack of direction towards solution of jurisdictional questions in terms of either the party concerned or itself.

Following the enactment of the Taft-Hartley Act in 1947, the Board began to emphasize flow and dollar volume of an employer's operations which had an impact upon interstate commerce in deciding whether to assert or decline jurisdiction. 5  The Board's increased case load due to the new law appears to be at least part of the reason for this change.

3 318 LRRM 76 (1946). Section 4(s) of the Act was concerned with agency policy regarding working rules. "Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure or practice, or in any situation in which the agency upon good cause finds that notice and public procedure thereon are impractical, unnecessary or contrary to the public interest." 18 LRRM 3003 (1946).


5 Cousins Tractor Co., 72 NLRB 857 (1947); Herff Motors, 74 NLRB 1007 (1947); F. G. Congdon, 74 NLRB 1051 (1947); Coopersville Cooperative Elevator Co., 73 NLRB 480 (1947); Foreman Clark, 74 NLRB 77 (1947); Burnett-Binford Lumber Co., 75 NLRB 421 (1947).
It observed flow of an employer's business to determine its impact upon interstate commerce. It considered dollar volume of an employer's interstate business in order to evaluate the significance of the impact. However, this change in no way affected the Board's primary concern with "impact" in deciding jurisdictional questions. A company with a small dollar volume operation was not necessarily immune from Board jurisdiction. The effect of the change was to allow the Board more latitude in meeting a practical problem without the necessity of sacrificing its function as an administrative agency. This policy was formally called de minimis.

The first instance of an overt internal policy clash among Board members over the application of jurisdictional standards was a result of this emphasis on flow and dollar volume. However, concern over the application of the particular standard involved was superficial in that it was resolved within the next year.6

Conflict Between the General Counsel and the Board.—A fundamental policy conflict evolved between the Board members and the General Counsel. It involved the Board's overall policy in jurisdictional questions. These differences were highlighted in a joint appearance of Chairman Herzog and General Counsel Denham before the Joint Congressional Committee on Labor-Management Relations in June of 1948. Mr. Denham argued that Section 10 (a) of the Taft-Hartley Act required that the Board exercise its full jurisdiction. The Act had extended coverage to several additional groups

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6Liddon White Truck Co., 76 NLRB 1161 (1948), the dispute arose. Hom Ond Food Stores, Inc., 77 NLRB 647 (1948), the dispute was settled.
of employers and employees through its provisions. Therefore, the Board, in order to meet these new problems and in addition to conforming with Section 10 (a), should assert jurisdiction over all industry "affecting" commerce.

There is a vast difference between being engaged in interstate commerce in the broad sense of the word and being engaged in a business which affects commerce. Under the National Labor Management Relations Act the latter (interpretation) applies. Our jurisdiction is not measured by being engaged in interstate commerce. Our limitations are those that are inherent in the sole question, "Does the business affect commerce?"

Mr. Herzog stated that he was speaking on behalf of the entire Board. He said the members did not believe that blanket jurisdiction was required of the Board, with the possible exception of the construction industry. The Board was unanimous in its approval of the ad hoc approach to jurisdictional questions. Mr. Herzog noted that there were three major reasons for continuing this approach. First, if Congress intended the Board to follow a different approach the wording of Section 10 (a) would have to be changed. Second, the Board had a case load problem arising from the Taft-Hartley Act. As of July 1, 1946, Congress slashed the Board's appropriations, which resulted in about a twenty per cent cutback in

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7 21 LRRM 45.

8 This exception was a result of the Board's concern with the secondary boycott's effectiveness in this particular industry. In that several employers and unions usually are engaged in work upon a common premise, any disruption of work was magnified by this unique circumstance. Controversy presently exists as to whether the union's action in this industry constitutes an illegal secondary boycott or a legal strike.

9 In supporting this statement, Mr. Herzog cited the Liddon White-Hom Ond controversy, as indicating desire to continue the ad hoc approach.
Board personnel. Finally, the courts did not encourage or compel the Board to alter its use of this approach. Following the joint appearance, the conflict was resolved by Mr. Denham's resignation on November 27, 1950.

**Formal Standards—A Clarification of the Board's Past Jurisdictional Policy**

Nine formal standards were announced through the medium of nine separate case decisions in 1950. All were specifically derived from past Board decisions that applied to various industries. The dollar minimums represented no significant deviation from those usually employed under the *ad hoc* approach. The Board's reasoning in support of the formal standards was founded upon the increasing size of its case load.

The Board's policy change in terms of its formal standards was subtle. It switched from an implicit to an explicit and formal policy of enforcing the *de minimis* doctrine. Any business whose dollar volume of operations affecting interstate commerce was below the dollar minimum of the applicable standard was exempt from Board jurisdiction. In essence, the effect of this policy change was to formalize an existing informal policy.

The Board initiated no fundamental changes in the content of any of the standards prior to Mr. Farmer's appointment as Chairman in 1953. The national defense standard was modified in order to increase the Board's jurisdiction over industries in and affecting national defense.

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10 18 LRRM 77 (1946).
The Board continued to adhere to a formal de minimis policy. Any deviations from this policy by the Board were in the direction of extending its jurisdiction. This was apparent in its extensive use of the combination inflow-outflow standard. The Board's application of this particular standard appeared to be the result of a change in its procedures for processing cases.\(^{11}\) The Board established two new policies not specifically related to the formal standards. One governed non-profit organizations and educational institutions. The other was concerned with employers' use of financial data in appearing before the Board. Neither of these policies conflicted with the Board's use of a formal de minimis policy. Both policies represented an extension of the Board's jurisdictional area.

_Evaluation of Factors Influencing Clarification._—Section 10 (a) of the Labor Management Relations Act of 1947 attempted to initiate a formal delineation of jurisdiction between the Board and the state labor relations boards.\(^{12}\) It essentially disrupted the Board's policy of ceding jurisdiction to state labor relations boards in certain labor cases.

\(^{11}\) George J. Bott had replaced Mr. Denham as General Counsel. He proceeded to institute a revised procedural approach for handling cases falling within Board jurisdiction. It was quite successful. By 1952 average time spent on election cases was reduced from forty-one to four days. The Board's total time allotted to contested election cases was reduced from one hundred sixteen days to sixty-nine days. As a result the Board reduced its backlog of cases in preliminary stages of investigation from one thousand four hundred to three hundred fifty. 31 LRRM 116-117 (1952). The result appeared to be largely responsible for deviations by the Board from its de minimis policy in the direction of extending its jurisdictional area.

\(^{12}\) See footnote 12 in Chapter I for the amended wording of Section 10 (a).
However, the Board had not made frequent use of this policy. Therefore, it quickly adhered to the amended Section 10 (a) with a stringent interpretation which virtually destroyed its practical use of the cession policy.\(^{13}\)

Presumably the degree of conformity required is one which necessitates the enactment by a state of a law containing substantive and procedural provisions similar to those embodied in . . . the Taft-Hartley Act . . . . A cession agreement would be valid only so long as the interpretation of the state statute by the state board and state courts is not inconsistent with the interpretation of the federal Act by the N.L.R.B. and federal courts.\(^{14}\)

The Board decided jurisdictional questions upon an ad hoc basis up to the 1950 standards. This was a result of the wording of Section 10 (a) which did not provide a clear demarcation between the culmination of the Board's jurisdiction and the beginning of the state labor relations board's jurisdiction.\(^{15}\) Congress made no effort to amend Section 10 (a) in order to

\(^{13}\) *Keizer Frazer Parts*, 80 NLRB 1050 (1948); *Adams Motors, Inc.*, 80 NLRB 1519 (1948).


\(^{15}\) This section of the Taft-Hartley Act represented the efforts of the House Committee on Labor's activities in relation to the "no man's land" problem. The Committee was chairmained by Howard D. Smith, a conservative Republican from Virginia. Its premise for corrective action in relation to the Federal-State jurisdiction problem was that the NLRB had been "irresponsible in its interpretation of the commerce clause." The Board's activities in this area represented a "... vital nullification of states rights . . ." 7 LRRM 880 (1941). The Majority believed that the determination of the basis of jurisdiction between Federal, State and Territorial governments was a legislative responsibility and prerogative. Yet Mr. Smith, in his summary statement of the committee's investigation and proposals to correct the "no man's land" problem, said, "Since the question affects many other states no definite recommendations on limiting the present concept (NLRB's preemption right in jurisdictional
return to the Board a degree of flexibility in its cession agreements with the states. As a result of this confusion over proper roles of the state and national boards, the "no man's land" problem was created. This problem had not been present to any notable degree prior to the Labor Management Relations Act of 1947. This was due in large part to the Board's use of the cession agreement with state boards plus its freedom from the provision of the LMRA. However, Chairman Herzog noted that the "no man's land" problem could assume significant proportions unless the states or Congress asserted corrective action.

Unfortunately, another partial solution is not now as available as I once had hoped it might be. The Board is not as free as it was before 1947 to share jurisdiction with State labor boards over those local enterprises that affect interstate commerce only slightly. Under 10 (a) of the amended Act, the NLRB can only cede jurisdiction to such boards if the state statute is consistent with the Taft-Hartley Act. There is considerable danger of creating a 'no man's land', especially if the NLRB decides to refrain from asserting its jurisdiction to the hilt.

questions) are suggested." 7 LRRM 880 (1941). The minority report of the committee concluded its views with the comment that the Majority could not offer any semblance of a useful method in attacking the problem because the major proportion of their time was spent "in wholesale castigation of Board Personnel." 7 LRRM 802 (1941). As a result between 1940 and what appeared as Sec. 10 (a) in the Taft-Hartley Act, the Federal-State jurisdiction problem was never again seriously investigated prior to the Taft-Hartley Act. It appeared that this was due in large part to the committee's attention turning to the question of separation of the Board's prosecuting and investigatory functions from its adjudication function.

The "no man's land" refers to those employers who are not covered by the state labor relations boards' jurisdiction, or the Board's jurisdiction.


17 32 LRRM 57 (1947).
BUDGET APPROPRIATIONS FOR THE NATIONAL LABOR RELATIONS BOARD, FISCAL YEARS 1947-60

<table>
<thead>
<tr>
<th>Year</th>
<th>Appropriation</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>1947</td>
<td>$4,069,000</td>
<td>U.S., Statutes at Large, 60, Part I, p. 698.</td>
</tr>
<tr>
<td>1950</td>
<td>$8,550,000</td>
<td>U.S., Statutes at Large, 63, Part I, p. 743.</td>
</tr>
<tr>
<td>1951</td>
<td>$8,582,500</td>
<td>U.S., Statutes at Large, 64, Part I, p. 655.</td>
</tr>
<tr>
<td>1952</td>
<td>$8,233,959</td>
<td>U.S., Statutes at Large, 65, p. 221.</td>
</tr>
<tr>
<td>1953</td>
<td>$9,000,000</td>
<td>U.S., Statutes at Large, 66, p. 370.</td>
</tr>
<tr>
<td>1954</td>
<td>$9,125,000</td>
<td>U.S., Statutes at Large, 67, p. 257.</td>
</tr>
<tr>
<td>1955</td>
<td>$8,400,000</td>
<td>U.S., Statutes at Large, 68, pp. 445-446.</td>
</tr>
<tr>
<td>1956</td>
<td>$8,800,000</td>
<td>U.S., Statutes at Large, 69, p. 410.</td>
</tr>
<tr>
<td>1957</td>
<td>$8,951,000</td>
<td>U.S., Statutes at Large, 70, p. 436.</td>
</tr>
<tr>
<td>1959</td>
<td>$13,100,000</td>
<td>U.S., Statutes at Large, 72, p. 474.</td>
</tr>
<tr>
<td>1960</td>
<td>$14,886,000</td>
<td>U.S., Statutes at Large, 73, p. 356.</td>
</tr>
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</table>

**Table II**

National Labor Relations Board Case Load, 1947-1960, Classified as to Type of Case

<table>
<thead>
<tr>
<th>YEAR</th>
<th>Unfair Labor Practice</th>
<th>Union Representation</th>
<th>Union Shop Authorization</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Completed</td>
<td>Pending</td>
<td>Completed</td>
</tr>
<tr>
<td>1947</td>
<td>4,232</td>
<td>2,443</td>
<td>10,677</td>
</tr>
<tr>
<td>1948</td>
<td>3,643</td>
<td>2,398</td>
<td>6,817</td>
</tr>
<tr>
<td>1949</td>
<td>5,314</td>
<td>3,049</td>
<td>8,370</td>
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<tr>
<td>1950</td>
<td>5,809</td>
<td>3,243</td>
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<tr>
<td>1951</td>
<td>5,503</td>
<td>3,901</td>
<td>10,291</td>
</tr>
<tr>
<td>1952</td>
<td>5,387</td>
<td>3,068</td>
<td>10,603</td>
</tr>
<tr>
<td>1953</td>
<td>5,868</td>
<td>1,164</td>
<td>9,909</td>
</tr>
<tr>
<td>1954</td>
<td>5,962</td>
<td>2,672</td>
<td>7,975</td>
</tr>
<tr>
<td>1955</td>
<td>5,171</td>
<td>2,672</td>
<td>7,412</td>
</tr>
<tr>
<td>1956</td>
<td>5,619</td>
<td>2,318</td>
<td>8,070</td>
</tr>
<tr>
<td>1957</td>
<td>5,144</td>
<td>2,680</td>
<td>7,514</td>
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<tr>
<td>1958</td>
<td>7,289</td>
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<tr>
<td>1959</td>
<td>11,465</td>
<td>5,425</td>
<td>8,800</td>
</tr>
<tr>
<td><strong>1960</strong></td>
<td><strong>---</strong></td>
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</tr>
</tbody>
</table>

*There were no union shop authorization cases in 1947 because the Board had not yet devised a procedure to handle them. The Taft-Hartley Act had just been enacted that same year. The union shop authorization elections were abolished on October 22, 1951, by amendments to the L.M.R.A.

The states increased this pressure upon the Board for a reconsideration of its jurisdictional policy. They failed, however, to enact a single law that fulfilled the cession requirements of the courts and Board's interpretation of Section 10 (a) as amended. While most states complained that the Board and Congress were doing nothing to alleviate the "no man's land" problem, a few, lead by New York state, attacked it as best as possible under the circumstances of federal inaction. 19

Another factor which had an effect upon Board jurisdictional policy and standards was its case load in relation to its annual budget appropriations. Congress directly determined the latter through law and indirectly determined the former through the scope of law. According to Table I, the Board's appropriations in 1948 represented a $906,700 increase over the 1947 figure. Table II shows that the Board's case load increased greatly after the passage of the L.M.R.A. In addition to maintaining its regular case load, the Board acquired 26,099 union authorization election cases. In order to meet this new problem the Board appears to have diverted its attention from the traditional jurisdictional areas of unfair labor practices and union representation issues in order to concentrate upon the new area of union authorization elections. This move appears to explain the Board's notable drop in annual case load completed in the traditional jurisdictional areas in 1948. Table I illustrates approximately a 100% increase in budget appropriations in 1949 over the 1948 figure. As a result the Board was able to return its attention

19 N.Y. State used an ad hoc approach. They placed the burden of proof of NLRB jurisdiction upon the plaintiff. In this manner the state slowly established a line of demarcation between federal and state jurisdiction. The court's upheld all of their decisions in this area in 1949. 26 LRRM 69-71 (1949).
to the traditional jurisdictional areas. However, in 1950, the Board suffered a 10% cutback in budget appropriations as shown in Table I. Congress based this reduction in large part upon a new technique developed by the Board for processing union authorization cases. According to Table II annual case load completed and pending was increasing in both traditional jurisdictional areas. The Board faced a dilemma. Cases were entering their administrative system at a faster rate than they were leaving the system. The cutback in budget appropriations encouraged the worsening of this case load problem, by forcing a decrease in the number of the personnel maintained by the Board. It had just completed a reorganization from a case flow viewpoint in 1948. The reorganization was concerned with increasing the Board's efficiency in view of the anticipated increased case load from the passage of the Taft-Hartley Act. As a result of the budget appropriations cutback in question and in light of a current attempt at increased efficiency, the only logical alternative facing the Board was to limit its jurisdiction in such a manner as to decrease its total case load. Therefore, it appears that the case load - budget relationship contributed a direct pressure towards encouraging the Board to alter its jurisdictional policies and standards. 20

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20. It is realized that the author's interpretations and conclusions are tenuous concerning the analysis of the relationship between the Board's annual case load and its annual budget appropriations. The two major variables affecting the importance of these two factors have been implicitly held constant in relation to their influence upon the Board's jurisdictional policies and standards. These two variables were size of the Board's organization — number of personnel and productive efficiency of the personnel — average time processing a case. As these two factors vary in importance over time, they would indubitably affect the significance of case load and budget as causal factors of a change in Board policy or
As a result of the Hoover Commission report on the operations of the N.L.R.B., President Truman submitted to Congress on March 13, 1950, his Reorganization Plan No. 12. It called for "... the elimination of the independent office of the General Counsel and the transfer of the functions to the Board." Following up the plan the President asked Mr. Denham, then the General Counsel, to resign on November 27, 1950. Throughout the duration of his administration, President Truman was constantly advocating the repeal of the L.M.R. A. in his messages to Congress. However, he never specifically addressed himself to the problem of Federal-State jurisdiction. Therefore, it appears that the Executive was not a factor directly pressuring the Board for changes in its jurisdictional standards or policies. President Truman implicitly adhered to a policy standards. In that both of these factors were subject to complex definitions, the determination of their importance would be impractical. In defining productive efficiency consideration would have to be given to questions such as: (1) What type of case was being considered—unfair labor practice or representation? (2) How far through the Board's administrative processes had the case proceeded prior to settlement? In defining size of the Board's organization questions such as what personnel would have to be considered—part time or full time; which personnel would be included—secretaries, legal assistants, trial examiners? However, the author's assumptions of constancy of these two variables were less important in relation to case load and budget when the conclusions drawn from the latter factors were viewed in a larger context. Therefore, case load and budget appropriations were only two of several factors influencing the Board in relation to its jurisdictional standards and policy.


of moderation in relation to Board jurisdictional policy by removing Mr. Denham from office as General Counsel. He disagreed with Mr. Denham's advocating a policy of substantial extension of the Board's jurisdictional area.

The courts never specifically questioned or challenged the Board's jurisdictional policy or standards during the Chairmanship of Mr. Herzog. Prior to the 1950 standards, the federal courts explicitly stated that the Board's jurisdictional authority as established in Section 10 (a) of the Taft-Hartley Act was "exclusive" and "paramount" in the handling of "unfair labor practices, union representation, and union authorization cases." The only exception to this authority was in the case of retroactive application. The Supreme Court in the Halexton Drug Stores, Inc. case enforced the Board's 1950 standards. The appeals courts stated that the L.M.R.A. did not deprive the Board of its policy formulation powers in regard to its jurisdiction questions. The Board could dismiss complaints where the legal theory in support of a complaint was inapplicable, where the factual allegations of the complaint were unproven, or where the policies of the L.M.R.A. would not be effectuated by its

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23 Bethlehem Steel Co. v New York State Labor Relations Board, 330 U.S. 767 (1947); Lacrosse Telephone Corporation v Wisconsin Employment Relations Board, 336 U.S. 18 (1947); Algoma Plywood Co. v Wisconsin Employment Relations Board, 336 U.S. 301 (1949); Natelson Brothers v New York State Labor Relations Board.

24 In the Natelson Brothers case the court stated that the Board's pre-emption prerogative was not retroactive in relation to its assertion of jurisdiction over an employer. Therefore, a cession agreement with New York State Labor Relations Board remained valid and was not nullified by Section 10 (a) as amended by the L.M.R.A.

25 187 F.2d. 418 (CA 9); cert. denied 342 U.S. 815 (1951).
assertion of jurisdiction. In essence the jurisdictional policy of the Board within broad limits was solely the concern of its members. The courts indicated they would not interfere with this prerogative as long as it was exercised in the context of Section 10 (a). Therefore, it appears that the courts were not an instrumental factor in encouraging the Board to alter its jurisdictional policies or standards prior to the 1953 Republican Majority.

Post-1952 and the "Republican Board"

Majority's Reinterpretation of Past Precedent.—Mr. Farmer replaced Mr. Herzog as Chairman of the Board in 1953. There were no changes in the substantive content of the standards during this period; however, changes in the policy of applying the standards were rather drastic. The changes took three forms. First, a particular standard might be overruled by the Majority. Secondly, they might ignore a standard in refusing to assert jurisdiction. Finally, when the Board did apply a standard in asserting jurisdiction in a particular case, the Majority would disagree with the substantive content of the applicable standard. The Majority invariably consisted of Mr. Farmer, Mr. Styles and Mr. Rodgers.

In ignoring or overruling a standard, the Majority offered three types of reasoning. First, the operations of the employer involved were so small in dollar volume or "local" in coverage that a more equitable solution of a jurisdictional problem could be determined at the state

level.\textsuperscript{27} Secondly, when the employer's operations were "twice removed from interstate commerce," they were again "local" in nature and should not be subject to Board jurisdiction.\textsuperscript{28} Finally, they indicated that state labor relations boards could more adequately consider cases that were "local" in nature.\textsuperscript{29}

The results of these forms of reasoning rendered havoc to established Board policy. "Local," in relation to an employer's operations, was defined as small dollar volume or restriction of operations to a state or lesser political subdivision. Then "local" was equated with "insubstantial" impact upon interstate commerce. Therefore, if the employer's operations were "local," they were also "insubstantial" in their impact upon interstate commerce. If their impact upon interstate commerce was "insubstantial," then the operations were "local." This reasoning by the Majority appears to have a tautological ring to it. They stated a preconceived conclusion from a rather cursory observation of the facts of a case. The conclusion was then used as a basis for analysis in evaluating the facts of a case.

The results of this approach in reasoning was an absence of logical consistency within a single opinion between decisions in relation to

\textsuperscript{27}Small in dollar volume—Checker Taxi Co., 107 NLRB 921 (1953); Armour Research Foundation of Illinois Institute of Technology, 107 NLRB 1052 (1954). Local in nature—Inter-County Rural Electric Coop., 107 NLRB 1316 (1953); Local 1083; United Auto, Aircraft and Agricultural Implement Workers of America, 107 NLRB 470 (1953); Klinka's Garage, 106 NLRB 969 (1953); Taichert's, Inc., 107 NLRB 779 (1954).

\textsuperscript{28}Casey Welding Works, 107 NLRB 929 (1953); Brooks Woods Products, 107 NLRB 237 (1953); Atkinson Electric Co., 108 NLRB 721 (1954).

\textsuperscript{29}Ibid.
a particular standard; and finally, between standards. This lack of logical consistency was manifest in two general characteristics of their reasoning. They alluded to broad vague generalizations in declining or asserting jurisdiction. They became preoccupied with the technicalities of the facts in a case. This would lead them to esoteric conclusions, devoid of any relationship to the impact of an employer's operations upon interstate commerce. Member Murdock's dissents lucidly revealed these characteristics.

New Substantive Standards Arising from Reconsideration.—The revised jurisdictional standards were announced in the form of a press release issued by the Board on July 15, 1954. The Majority ignored the "lead" case approach which had been the Board's accepted procedure for the introduction of changes in the substantive content of standards. Instead several of the new standards were sporadically introduced in particular cases. In these instances several of the standards had no relation to the particular case being heard by the Board. None of the


31 Local 1003, see footnote 27. Klinka's Garage, see footnote 27. Taichert's, Inc., see footnote 27.

32 John McCormack Co., 107 NLRB 1402 (1954); Brooks Woods Products, see footnote 28.


34 Jonesboro Grain Drying Cooperative, 110 NLRB 481 (1954).
revised standards were referenced to past Board decisions when applied to specific industries. In addition they represented significant alterations of the substantive content of the 1950 standards, beyond the mere increase in dollar minimum requirements.

The content of the instrumentalities and channels of interstate commerce, public utilities and transit systems, multistate enterprises, indirect outflow and national defense standards increased in complexity. The instrumentalities and channels of interstate commerce standard treated separately intrastate trucking, radio, television, and newspaper industries. The public utilities and transit systems standard distinguished between intra and interstate public utilities and transit systems. The multistate enterprise standard eliminated the earlier franchise dealer standard, while establishing a demarcation between a multistate enterprise as an entity and operations of one of its branch companies. The indirect outflow standard added the requirement that the employer's goods or services must be "directly utilized" by a secondary employer in interstate commerce in order for the Board to assert jurisdiction. The national defense standard stated two additional requirements for employer's to meet whose operations affected our national defense. His goods or services must be provided pursuant to government contract in addition to being directly related to national defense.

The combination inflow-outflow standard of the 1950 standards was eliminated by the 1954 standards. In its place the Majority established two new standards. One was concerned with non-retail multistate chain stores. Under this standard the Board's past standard governing office buildings was eliminated. The second new standard was designed
to cover all retail stores as a category. Included in this category were public restaurants. The Majority explicitly declined jurisdiction over them as an industry. Their jurisdiction over retail stores was dependent upon a complex inflow-outflow formula. The Majority's reasoning in support of the new standards was twofold. Increased case load and budget limitations was one source of impetus for the change. The other factor was a desire to separate "essentially" local enterprises from those having a substantial impact upon the flow of interstate commerce.

Several of Chairman Farmer's and Member Rodger's speeches to various private and public organizations prior to the formal announcement of the new standards indicate the significance of the change in Board approach in relation to jurisdictional policy.

I am convinced that there are too many; (cases before the Board and pending) Uncle Sam's long arm has reached out to assert itself over too many labor-management situations which ought to be resolved closer to their origin . . . . For example . . . a very large proportion of these cases involved businesses which employed fewer than 20 employees.35

The one thing this nation needs more than anything else to maintain its vigor and strength is a revival of interest by local government in tackling and solving problems of their local people. That is why I strongly advocate a gradual, but marked, withdrawal of the hand of the N.L.R.B. from strictly local disputes.36


regardless of the legal scope of the commerce clause, the Federal Agencies should as a matter of self restraint, impose limits on their power and thus provide the opportunity for local problems to be settled on a local basis. The first of these actions (which should be taken by the new members of the Board) is to limit the jurisdiction of the Board—to free it from the consideration of hundreds if not thousands of cases which are markedly local in nature and impact. 

I believe that this Agency (N.L.R.B.) should assist the administration in pulling back the outer reaches of federal bureaucracy and thus encourage rather than impede the development of our communities and our states.

The common characteristic of this sequence of statements appeared to be a reiteration of the Majority's belief in local administrative control of small businesses based upon a partiality towards the "states rights" philosophy of government. The same characteristics were evident in the Majority's reasoning in their introduction of the new standards in the *Breeding Transfer Co.* case, the purpose of our jurisdictional changes being to eliminate purely local activities. The result of the Majority's concern with "local activities" encourage a highly complex and illogical application of the new standards in terms of measuring impact upon interstate commerce. When the new standards and policies were combined the result was a noticeable retraction of the Board's

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jurisdictional area.

The Majority's alteration of the subjective content of the 1954 standards, as announced in the July 15 press release, assumed two forms. Several of the standards were modified prior to their initial application in a case decision. These changes were not made available to the entire Board or public. The second and most often-used form of change was the Majority's consideration of special circumstances in each case. Various rationales were constructed by them in asserting or declining jurisdiction. The general effect of these changes encouraged a further retraction of the Board's jurisdiction by overruling the remaining sub or minor precedents of the 1950 era.

The Majority's rationale supporting their general jurisdictional policy remained unchanged. As a result inconsistency, conflict and complexity occurred in their application of the 1954 standards. These defects were compounded by attempts to modify the original standards. Each alteration served to increase the complexity of the already complex standards in addition to moving the Board further away from the context of measuring the impact of an employer's business upon interstate commerce. This complexity was specifically manifested in the Majority's requiring higher dollar minimums of multiplant interstate firms as

\footnote{Jonesboro Grain Drying Coop., see footnote 34. Bickford's, Inc., 110 NLRB 1904 (1954); Reeves and Sons, Inc., 111 NLRB 186 (1955).}

\footnote{Central Electric Power Coop., 113 NLRB 1059 (1954); Checker Cab Co., 110 NLRB 683 (1954); Tanner Motor Tours, 112 NLRB 275 (1955); Orkin "The Rat Man", Inc., 112 NLRB 765 (1955); Reliable Mailing Service, 113 NLRB 1263 (1955).}

\footnote{Checker Cab Co., see footnote 42. McKinney Avenue Realty, 110 NLRB 546 (1954).}
opposed to multiplant intrastate firms and in the application of a combi-
nation inflow-outflow formula solely to intrastate firms. In addi-
tion, attempts were made to establish an unrealistic intra-interstate 
distinction in the transportation industry. Inflexibility resulted from 
the Majority's strict adherence to a policy of applying a single stand-
ard to a case. They did not consider the standards interchangeable.

With the Majority employing the "local-insubstantial" rationale, 
based upon a concern with states rights, as the criterion in determining 
jurisdictional standards and policy, the results which occurred could 
have been expected. In substituting the rationale for the criterion of 
impact upon interstate commerce, the Majority destroyed the thread link-
ing current and past precedent. Therefore, the complexity of the sub-
stantive content and the inflexibility of application of the 1954 stand-
ards by the Majority was an understandable and probable result.

Evaluation of Factors Influencing Reinterpretation.—Congress 
continued to oppose any alteration of Section 10 (a) of the Taft-Hartley 
Act. Senator Ives (Republican, New York), Senator Goldwater (Republican, 
Arizona), and Senator Wiley (Republican, Wisconsin), introduced indivi-
dual bills attempting to correct the wording of this section.

44 Higher dollar minimums for intrastate firms, Ransom Randolph 
Co., 110 NLRB 2204 (1954); McKinney Avenue Realty Co., see footnote 43. 
Reflects the intrastate inflow-outflow formula, Autry Greer & Sons, 112 
NLRB 44 (1955); Greenberg Mercantile, 112 NLRB 710 (1955).

45 Tanner Motor Tours, see footnote 42. Fort Knox Construction 
Co., 112 NLRB 140 (1955). Ransom Randolph Co., see footnote 44. Orkin 
"The Rat Man," see footnote 42.

46 Senator Ives - S. 1264, Senator Goldwater - S. 1161, Senator 
Wiley - S. 2218. U.S., Congressional Record, 83rd Congress, 1st Sess., 
1953, Part II, p. 1846.
The intent of all three bills was to enable the state labor relations boards to move into the "no man's land" and assert jurisdiction under the two conditions. The employer's business had to have an "insubstantial" impact upon interstate commerce. In addition, the Board must have declined jurisdiction in the particular case. All of the bills failed to receive Senate approval. Therefore, Congress by its inaction continued

47 The intent or meaning of "insubstantial" was never elaborated upon by any of the Senators in any of the bills.

48 There was a decided split in the Senate Labor Committee over proposed treatment of the federal-state jurisdiction problem. The Majority's view advocated that the states could assume jurisdiction declined by the Board under their police power to maintain public order. The minority stated that this power was already given to the states by the Constitution. Secondly, the Supreme Court had specifically forbid the states to use the police power in asserting jurisdiction over labor disputes affecting interstate commerce. (Garner v Teamsters Union, 346 U.S. 485 (1954)). Thirdly, if the committee was sincerely interested in arriving at a workable solution to this problem, they would have considered the minority's compromise proposal. Its central theme was to have the Board extend its jurisdictional area while Congress would reword Section 10 (a) to increase state participation in the "no man's land" area. But instead the Majority ignored the minority. "Time honored rules of parliamentary procedure were patently disregarded (by the Chairman, Mr. Smith—Republican, New Jersey). To illustrate in the closing moments of the final meeting the Chairman refused to poll the committee on a pending minority motion relating to the federal-state jurisdiction problem, a matter clearly within the scope of the President's message." U.S. Congress, Senate, Committee on Labor and Public Welfare, 83rd Congress, 2nd Session, 1954, Report 1211, p. 2. Finally, in lieu of Congressional action, the minority said, "The Board did several years ago publish its standards. During the last year (1953), however, it has, without explicitly setting aside these standards, completely ignored them." Ibid., p. 15. It is interesting to note that the members of the minority consisted of some respected legislators in the area of labor law—James E. Murray, Paul H. Douglas, John F. Kennedy, M. M. Neeley, H. H. Lehman.
to exert pressure indirectly upon the Board to extend its jurisdiction.

The states continued to avoid enacting any legislation in conformance with Section 10 (a) of Taft-Hartley Act. General Counsel George Bott suggested to the states to attempt legislation as a remedy to the "no man's land" problem. Not a single state had heeded his warning by 1955, and the Board was once again pressed to act in the "no man's land" area.

The Board's budget appropriations increased in 1953 and 1954 according to Table I. The decrease in appropriations in 1955 had no effect on Chairman Farmer's jurisdictional policies and standards due to his resignation early in that fiscal year. Table II showed that case load completed in the unfair labor practices area increased insignificantly. Case load pending in this area represented over a one hundred per cent increase from 1953 to 1954. This could be expected and attributed to the employer's expectation of a sympathetic Board, in that the majority of its members represented the appointments of a Republican administration. Case load completed and pending decreased in the representation area according to Table II. This result appears to be attributable to the increased case load in the unfair labor practices area. The unions believed that there would be little sympathy with their philosophy on a Republican dominated Board. The net case load pending and completed in both jurisdictional areas between 1953 and 1954 appeared to remain relatively stable in relation to the years 1948 through 1952⁴⁹ according to Table II. If there was a discernable overall trend it appeared to be a

⁴⁹Note the exception of case load pending in the unfair labor practices area.
decline in total case load. The load, pending increase in unfair labor
practices, was off balanced by the case load pending decrease in the re-
presentation area. However, it appeared debatable whether the overall
or total case load remained stable or decreased in comparing the two
periods. Yet, the total case load did not appear to increase between
these two periods. The Board's budget appropriations did increase sig-
nificantly in 1953 and 1954 as compared with the 1948 through 1952 per-
iod. Thus the relationship between case load and budget during Mr. Far-
mer's chairmanship could be defined as an increasing budget with a stable
or possibly decreasing case load. Therefore, it did not appear logical
that this factor exerted a pressure upon the Board to retract its area
of jurisdiction. Certainly this factor did not exert the degree of pres-
sure for a retraction of jurisdiction under Mr. Farmer as it did under
Mr. Herzog. Under the latter chairman, budget appropriations had de-
creased and case load pending and completed had increased in both areas
of jurisdiction.50

The Executive assumed an active role in relation to the problem
of Federal-state jurisdiction. President Eisenhower, in his State of
the Union and labor messages to Congress in 1954 and 1955, specifically
urged Congress to arrive at a solution to the "no man's land" problem.
His preference was to award the states jurisdiction where the federal
law did not conflict with the state law in this area.51 While his in-
tentions were sincere, the President never succeeded in sending a

50 See p. 80.
51 LRRM 90.
specific proposal to the House of Representatives or the Senate committees handling labor problems. This appeared to be a result of a conflict between his advisors over a proper solution.\textsuperscript{52}

DEAR ALEX: You will recall in my message to Congress making recommendations for changes in the Taft-Hartley Act, I briefly discussed the need for clarification of jurisdiction between Federal, State and Territorial governments in the labor-management field and stated, "The department and agency concerned, are at my request, presently examining the various areas in which conflict occurs. When such examinations are complete, I shall make my recommendations to Congress for corrective legislation." My Associates are still studying this extremely complex problem and . . . . that study has not as yet been completed . . . .\textsuperscript{53}

The "study" never was completed. The President never offered any specific recommendations. Yet his efforts appeared to have been influential in affecting the Board's retraction of its jurisdictional area in that they were in precise agreement with those of Chairman Farmer and the Majority. Both viewed an increase in state participation in jurisdictional questions as a solution to the "no man's land" area.

In 1953 a disagreement arose between the circuit courts of appeal

\textsuperscript{52}Senators Goldwater, Ives and Wiley desired returning jurisdiction to the states when declined by the Board. Labor Secretary Mitchell was in favor of clarifying the state's position in the area. He was opposed to "opening the Taft-Hartley Law to the possibility of forty-eight different kinds of state laws. The result would be chaos." \textit{New York Times}, March 26, 1954, p. 10. As a result of this conflict Chairman Smith of the Senate Committee on Labor and Public Welfare was in a quandry. "I've found differences of opinion wherever I go. Some people want the Taft-Hartley to stand as it is with respect to state jurisdiction. But the right to work states don't want to be shut out." \textit{New York Times}, March 26, 1954, p. 10.

\textsuperscript{53}A letter from President Eisenhower to Chairman Smith of the Senate Committee on Labor and Public Welfare. \textit{Report 1211}. 
over the importance of the retail auto dealer franchise agreement as a sufficient basis for the Board to assert jurisdiction. The sixth court of appeals held that the presence of the agreement was sufficient evidence of the employer's "affecting" interstate commerce. The ninth court of appeals in an earlier case had held that the franchise agreement was insufficient evidence of "affecting" commerce. They noted that the Board should also consider how the arrangement between the manufacturer and dealer actually worked. The sixth circuit court of appeals asked the Supreme Court for a ruling. In 1954 it handed down a ruling enforcing the sixth circuit court of appeals contention. The franchise agreement was ample evidence of an interdependence between dealer and manufacturer. In the other important case in this area, the Supreme Court explicitly stated that the primary interpretation and application of the Board's jurisdictional policies and standards were solely a Board responsibility. "Congress evidently considered that centralized administration of specifically designed procedures was necessary to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." The circuit courts of appeal were

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concerned in 1954 with enforcing the Board's de minimis policy evolving out of the 1950 standards. They held that the Board could assert jurisdiction where an employer's work was local in nature, yet affected interstate commerce in such a manner as to obstruct its flow. They would not review the Board's jurisdictional policy as long as it had a reasonable basis in law.

In essence the courts had enforced the Herzog jurisdictional policies. The Majority's jurisdictional standards and policies were in direct conflict with these court decisions. In one instance they directly overruled the Supreme Court's decision in relation to the retail auto dealers franchise arrangement. They ignored the de minimis policy. However, an important distinction must be emphasized. Neither the Supreme Court or the circuit courts of appeal had directly questioned the Board's jurisdictional standards or policies through 1954. They stressed that such questions were to be solved by the Board. Therefore, the courts provided no direct encouragement or discouragement in relation to the change that occurred in the Board's jurisdictional standards and policies during Mr. Farmer's chairmanship.

In summary, the executive, legislative and judicial factors were not instrumental in influencing the change that occurred in Board policy.

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Wilson Oldsmobile Co., 110 NLRB 534 (1954) was in direct conflict with the Supreme Court's decision in the Bill Daniels case, see footnote 56.

Taichert's, Inc., see footnote 27.
and standards, under Chairman Farmer. The "no man's land" problem remained to pressure the Board for an extension of its jurisdictional area, as neither Congress nor the states attempted corrective action in the area. The Board's total case load remained relatively stable with a tendency towards decreasing. Its annual budget appropriations increased. The relationship between the two factors produced no pressure for a retraction of jurisdiction by the Majority. If anything, it encouraged an extension of the Board's jurisdictional area. The courts provided no direct or indirect impetus for a change in either direction. The Executive's encouragement of a state solution to the "no man's land" problem through Congress was ineffective. Therefore, it does not appear logical that the Majority's retraction of the Board's jurisdictional area between 1953 and 1954 could be explained as a result of influence emanating from these three major factors. Instead, it appeared that these three factors operated in such a manner as to encourage the Board to increase its jurisdictional area under its present standards while maintaining flexibility in its policy. The actual changes observed during this period were the direct reverse of logical expectations.

Pressure for Reexamination of the "No Man's Land"

Board's Reconsideration of Its Past Role.—The most significant change occurring prior to the 1958 standards was a reversal of the interpretations given the 1954 standards by the past Majority. Several of the complex substantive qualifications, constructed upon special
circumstances, were removed. However, this reversal was not complete. Some of the special constructions remained unaltered. A few of the dollar minimums were lowered, while some of the more complex standards were eliminated altogether. The overall effect of these changes was to reextend the Board's jurisdictional area.

The "local-insubstantial" rationale of the "old Majority" was adopted by the "new Majority" and used throughout 1956. After the Rogers Lumber Co. case in 1957, the rationale was not as commonplace in support of Majority rulings. It appeared only in relation to standards applied in special circumstances. The Rogers Lumber Co. case indicated that the Board had begun to reconsider objectively the impact upon interstate commerce as the major factor in deciding jurisdictional questions. This case reversed the past Board policy in the area of multiplant intrastate and interstate firms. The higher dollar minimum for interstate multiplant firms was lowered, thereby bringing it into line with the minimum required of multiplant intrastate firms. In addition, the intrastate combination inflow-outflow approach was eliminated.

The Board continued to adhere to a policy of inflexibility in

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62 Orkin Exterminating Co., 115 NLRB 622 (1956); Whippany Motor Co., 115 NLRB 52 (1956); Pazan Motor Freight, 116 NLRB 1568 (1956); Rogers Lumber Co., 117 NLRB 1732 (1957); Long Meadows Farms Cooperative, Inc., 115 NLRB 419 (1956); Morse Brothers, 118 NLRB 1312 (1957).

63 Rainer Theater Corp., 115 NLRB 952 (1956); R. Brown Cafeterias, 115 NLRB 1772 (1956); Charleston Transit Co., 118 NLRB 1164 (1957); East Newark Realty Corp., 115 NLRB 483 (1956).

64 Coca Cola Bottling Co. of New York, 114 NLRB 1423 (1955); Rogers Lumber Co., see footnote 62.

65 Combined Century Theaters, 120 NLRB 1379 (1958).
relation to the application of several standards in a case. An internal policy conflict developed between Member Jenkins and the rest of the Board over the value of a formal standards approach in solving jurisdictional problems. Member Jenkins believed that the Supreme Court in the recent Guss v. Utah Labor Relations Board decision implicitly demanded that the Board significantly reassert its jurisdiction. Mr. Jenkins thought that an ad hoc approach was the most simple method of accomplishing this goal, because it would put the employer on the defensive, thereby decreasing the Board's case load. This in turn would allow the Board to extend its jurisdictional area. However, the Board ignored his argument. The general result of the Board's efforts during this period was to reextend its jurisdictional area.

New Substantive Standards Arising from Reconsideration.—Nine new proposed standards were announced on July 22, 1958, in a press release. They were put into effect on October 2, 1958, in several separate case decisions. This approach represented a compromise of the Herzog and Farmer approaches of using "lead" cases as opposed to press releases. The new standards represented a significant simplification of the content of the 1954 standards. In addition, all dollar minimums were lowered. The multistate non-retail, direct outflow, indirect outflow, multistate non-retail chain, direct inflow, indirect inflow, and retail stores standards were eliminated. In place of the old standards the Board

66 Charleston Transit Co., see footnote 63, Bottle Water Co., 117 NLRB 490 (1957); Brown Marine Drilling Co., 117 NLRB 331 (1957); Deskins Super Market, 115 NLRB 1571 (1956); Clark Concrete & Construction Corp., 116 NLRB 321 (1956).

67 See Chapter I, pp. 30-35.
would total either indirect or direct inflows or indirect or direct out-
flows, but not both, in asserting jurisdiction. They would also consider
the employer's flows from his total operations, if more than one plant or
operation was involved in a case.

These changes represented a significant change in direction, but
not a complete return to the 1950 standards. The Board refused to total
outflow and inflow as was the practice under the 1950 standards with the
combination formula. It also refused to exercise plenary jurisdiction
in the territories. Finally, even though the dollar minimums of all the
1958 standards were lowered, they were still higher than those of the
1950 standards.

The reasons given by Chairman Leedom for the new jurisdictional
standards were threefold. Under the 1954 standards the Board's area of
jurisdiction was much smaller than it had been under the 1950 standards.
As a result the problem of a jurisdictional "no man's land" became acute
because the states could not move into the "no man's land" area vacated
by the Board unless they enacted laws in conformance with the Taft-
Hartley Act. 68 None of them did this. As a result only two possible
solutions to the problem seemed available. First, the Board could

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68 As of the time of the Guss decision only twelve states had la-
bor relations laws. They were Colorado, Connecticut, Kansas, Massachu-
setts, Michigan, Minnesota, New York, Oregon, Pennsylvania, Rhode Island,
Utah, and Wisconsin. Yet the Supreme Court noted specifically in this
case that none of these laws were in conformance with Section 10 (a) of
the Taft-Hartley law. J. A. Jenkins, "Problems of Federal-State Juris-
330.
reextend its jurisdiction by simplifying the content and lowering the
dollar minimums of its jurisdictional standards if Congress increased
the Board's appropriations. Secondly, Congress could change the wording
of Section 10 (a) as amended in the L.M.R.A. The Supreme Court in the
Guss decision indicated the urgency and importance of the problem and
appeared to recommend Board action as a solution. This fact, coupled
with a Congressional appropriation of $1,500,000 specifically earmarked
for a solution to the "no man's land" problem, gave the Board a rather
clear directive to reconsider its jurisdictional standards.

The Board's policy change represented a compromise between poli­
cies advocated by Chairman Herzog and those of Chairman Farmer. Mr.
Leedom, unlike Mr. Herzog, did not view the Board's jurisdictional pro­
blems as solely legal questions. He felt the Board should assert juris­
diction over all industries whose operations had an impact upon inter­
state commerce within the limitations of its budget. In doing this, he
believed that the Board was fulfilling its legal obligation to encourage
and protect the institution of collective bargaining. His policy, un­
like Mr. Farmer's, did not advocate completely ignoring the impact upon
interstate commerce of an employer's operations as the critical criterion
in deciding jurisdictional questions. However, Mr. Leedom was like Mr.
Farmer in viewing jurisdictional questions as of a quasi-political na­
ture that consisted of attempts to balance practical considerations, such
as budget limitations, with the role of the Federal government vs. the
state government in the area of labor-management relations.

Jurisdiction is not much of a legal problem nowadays. It is more
of a problem of political science. It is influenced by budgetary
considerations and the merits and weaknesses of the administrative processes of the Federal Government. It presents philosophical considerations regarding the role of the Federal Government and its relations to state governments. One more way in which an ingenious lawyer can assist the labor Board is to suggest an adequate simple set of jurisdictional standards.69

Most of the content, including the dollar minimums of the 1958 standards remained unchanged through December, 1960. Section 14 (c) of the Landrum-Griffen Act, froze the Board's jurisdictional standards as of August 1, 1959. The only change that could be made after this law, in relation to the Board's jurisdictional standards, was the extension of its jurisdiction as opposed to retraction.

Mr. Leedom's "middle ground" rationale continued unchanged throughout his chairmanship. The Board continued to pressure Congress to increase state jurisdiction. "I said before, and I think it is so now, that this is too gigantic a burden to put on the Labor Board. I think it would reflect badly on the important cases to have us undertake to try all the little cases."70 Such a goal was finally realized in Section 14 (c) of the Landrum-Griffen Act which gave the states rights to enter the "no man's land" area.71

Evaluation of Factors Affecting Reconsideration.—In 1955 and 1956 there was no congressional action concerning the "no man's land" problem. Congressional interest reappeared in 1957 as a result of the


70 Ibid., p. 332.

71 See footnote 69 for the wording of Section 14 (c) of the Labor-Management Reporting and Disclosure Act.
the Supreme Court's decision in the *Guss* case.\(^\text{72}\) The Senate Committee on Labor and Public Welfare received a requested report in April, 1957, which advocated corrective legislation as a solution to the "no man's land" problem.\(^\text{73}\) The McClellan Committee investigating the problem in 1957 concluded that legislation coupled with the Board's assertion of jurisdiction to its greatest practical limits was a preferable solution. Mr. McClellan's proposal would allow the states jurisdiction over those areas in which the Board declined to assert jurisdiction.\(^\text{74}\)

The states continued to refuse to enact legislation in conformance with Section 10 (a) of the L.M.R.A. of 1947. The Supreme Court specifically noted this fact in their decision in the *Guss* case in 1957. Following this decision, the state labor relations boards formed an association. Its purpose was to steer a proposal through Congress that would amend Section 10 (a) thereby increasing their jurisdictional rights in the "no man's land" area. Having failed to accomplish this goal by the end of 1958, the states placed their support behind the Administration's proposal, which was basically the same as their original solution.

In summary, the states continued to exert a pressure upon the Board to extend its jurisdictional area, by refusing to enact the requisite legislation relieving such pressure.

According to Table I the Board's annual budget appropriations increased steadily between 1955 and 1957. Table II showed that its case

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\(^{72}\) *Guss v d/b/a/ Photo Sound Products Utah Labor Relations Board*, 353 U.S. 10 (1957).

\(^{73}\) *Jenkins*, XXXI, p. 329.

\(^{74}\) *LRPM 54*-62 (1958).
load completed decreased in the area of unfair labor practices and remained stable in the area of union representation elections between 1955 and 1957. These two factors tended to offset each other producing a neutral effect in relation to affecting the Board's jurisdictional policy and standards. Between 1958 and 1960 both the Board's annual budget appropriations and its case load completed and pending increased substantially according to Tables I and II. Once again a "neutralizing effect" occurred in relation to the factors' influence upon the Board's jurisdictional policy and standards. In 1958 the Board received the results of a private consulting firm's analysis of its operations. The analysis recommended to the Board that it reorganize its case flow and investigation procedures. 75 The "neutralizing effect" of the case load-budget appropriations factors when considered in the context of the reorganization problem produced a reluctance on the part of the Board to extend its jurisdictional area.

The Executive's position remained unchanged. President Eisenhower continued to advocate the states rights solution to the "no man's land" problem in his messages to Congress. The internal advisors' conflict had been resolved in favor of the state approach. The Executive's perseverance was rewarded in Section 14 (c) of the Landrum-Griffen Act, which favored the state solution to the problem. The President remained opposed to any further extension of the Board's jurisdiction. He was not in favor of the proviso of Section 14 (c) which froze the Board's 1958 standards.

75 4 LRRM 78-80 (1958). The McKinsey & Co. Management Consulting Firm was hired to do the analysis. The results were never made public.
In 1956 the circuit courts of appeal were interested in elaborating upon the Board's jurisdictional policy rights. They believed that the dollar volume of an employer's business was not an important consideration unless his operation's impact upon interstate commerce was de minimis.\(^76\) They noted that the Board was free to adopt restrictive policies in relation to jurisdiction either by announced standards or rule of decision.\(^77\) The Board could apply its 1954 standards in territories of the United States, because its jurisdictional power included the right to decline plenary jurisdiction.\(^78\)

In 1957, the Supreme Court stated in three separate cases that the Board's jurisdiction under the amended N.L.R.A. was "primary" and "exclusive."\(^79\) It said state agencies without a specific cession agreement could not assert jurisdiction in areas where the Board had declined jurisdiction. The Supreme Court was fully cognizant that its rulings contributed to the "no man's land" problem. It noted that the responsibility for a solution lay with the Board, Congress or the states. The Board could extend its jurisdictional area. Congress could clarify its intent in Section 10 (a) of the L.M.R.A. The states were free to enact


\(^77\) Optical Workers Union Local 24859, et. al. v N.L.R.B., 227 F.2d 687 (C.A. 5) (1956); cert. denied 352 U.S. 906 (1956).

\(^78\) Teamsters, Chauffeurs, Warehousemen & Helpers Local Union 183 v N.L.R.B., 238 F.2d 195 (C.A. 9) (1956).

legislation in conformance with Section 10 (a) of the L.M.R.A. In a fourth case the Supreme Court stated that the Board was without power to decline jurisdiction over labor unions as a class of employers. In 1958 no cases appeared in the federal courts concerning the Board's federal-state jurisdictional activity. In 1959, prior to the L.M.R.D.A., the Supreme Court directed the Board to assert jurisdiction over the hotel industry as a class of employers. Following the L.M.R.D.A., the Board ignored the Supreme Court's decision in relation to its assertion of jurisdiction over classes of employers. Its basis for this action was the wording of Section 14 (c) of the L.M.R.D.A., which gave discretionary power to the Board concerning this question. Throughout 1960 the Supreme Court continued to be primarily interested in protecting the Board's exercise of the federal pre-emption principle. The circuit courts of appeal during 1959 and 1960 focused their interest upon establishing a line of demarcation between federal and state jurisdiction in applying the amended N.L.R.A.

In summary, the federal courts did not directly pressure the Board to extend its jurisdictional area. They did act as a catalyst in clarifying the seriousness of the "no man's land" problem, thereby focusing attention upon the Board as having a partial solution through its

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81 Hotel Employees Local 255, and Hotel, Restaurant Employees and Bartenders International Union, AFL-CIO v Boyd S. Leedom, 359 U.S. 236 (1959).

82 See footnote 81.

83 Yellow Cab Service, Inc. v Superior Court (Washington State) 80 U.S. 400 (1960).
pre-emption prerogative. In 1958, Congress appropriated an additional $1,500,000 to the Board. It ordered the Board to extend its jurisdictional area on the basis of this appropriation. In November of 1959, Congress passed the Labor Management Reporting and Disclosure Act. Section 14 (c) of this law attempted to eliminate the "no man's land" problem. The general effect of the new provision is to give the "no man's land" as it existed on August 1, 1959, to the states, subject to the possibility that the NLRB could, in the future exercise of its discretion, expand its jurisdiction to take more cases affecting commerce.

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84 Section 14 (c) as enacted represented a political compromise. There were essentially three major proposed solutions to the "no man's land" problem. The Kennedy-Ervin Bill asked the Board to assert its full legal jurisdiction. Any state cession agreements would have to comply with Section 10 (a). The Administration proposal was to demand the Board to decline jurisdiction over those cases with an insubstantial impact upon interstate commerce. Then the state agencies and courts could assert jurisdiction over such cases. The Prouty compromise agreed with the Administration's proposal, but added the proviso that the state agencies and courts must apply federal substantive law and be subject to review by the federal courts. The Administration's proposal passed Congress with a proviso. The Board could not change its jurisdictional standards as of August 1, 1959, so as to effect a future retraction of its jurisdictional area. Section 14 (c): (1) The Board in its discretion, may by rule of decision or published rules adopted pursuant to the Administrative Procedures Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such a labor dispute on commerce is not sufficiently substantial to warrant the exercise of jurisdiction. Provided, That the Board shall not decline to assert jurisdiction under the standards prevailing upon August 1, 1959. (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory, from assuming and asserting jurisdiction over labor disputes over which the Board declined, pursuant to paragraph (1) of this subsection, to assert jurisdiction. 1 LRR 1493 (1960).

"Give to the states" did not imply that Congress invalidated the federal pre-emption prerogative of the Board. Legislative intent as stated in Section 14 (c) made it clear that state laws could prevail in those areas where the Board did not assume jurisdiction.

It was the opinion of the Senate that the Federal Law should prevail, but only in areas in which the NLRB does not now assume jurisdiction. The House provision specifically carries out the recommendation of the McClellan committee by authorizing State labor boards and courts to assume jurisdiction and to apply State law in cases over which the NLRB declines to assert jurisdiction.

Legal practitioners were nearly unanimous in supporting the above legislative interpretation as correct. They agreed that the federal pre-emption

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86 105 Congressional Record, p. 16, 255 (1959), as quoted from Ibid., p. 333.
87 105 Congressional Record, p. 16, 419 (1959), as quoted from Ibid., p. 333.
88 Following the passage of the Landrum-Griffin Act there were four possible courses of state action subject to the pre-emption principle. The Board may explicitly decline jurisdiction over a specific area of business, or class of employers. An example was the race track industry. Hialeah Race Course, Inc., 125 NLRB 388 (1959). The Board may remain noncommittal on the question of jurisdiction over a specific industry. Thirdly, it may assert jurisdiction in an industry already subject to state jurisdiction. Finally, the states may attempt to assert jurisdiction in an area already covered by the Board. There was little controversy between the NLRB and the state boards over the first two courses of action. It was mutually agreed that the states may assert jurisdiction. Conflict arose between the states and the Board over its proper roles in the latter two situations. However, it was mutually agreed that the pre-emption principle would take precedence over state action in the case of a dispute. "Coexistence of state and federal law obviously presents complex problems, although probably no more difficult and less unsettling than would have been created by complete pre-emption. . . . . Only in a rare situation does one law command that which the other prohibits, and when that occurs the conflict is simply resolved by giving primary to the federal command." Clyde W. Summers, "Pre-emption
principle was not invalidated by Section 14 (c). But they disagreed over the section's application in specific instances. However, they agreed in general that the states were free to move into the "no man's land" area subject to the limitations of the pre-emption principle. In summary, Congress exerted a direct pressure upon the Board to reextend its jurisdictional area, through the 1958 appropriation and the freeze of its standards as of August 1, 1959.


Ibid., the same sources.
CHAPTER III

CONCLUSIONS

Under Chairman Herzog

Of the three factors influencing the Board's establishment of the 1950 standards, the legislative factor was by far the most important in encouraging a practical retraction of the Board's jurisdictional area. Congress made no effort to increase the Board's flexibility in meeting the "no man's land" problem by reconsidering the wording of Section 10 (a). The states refused to enact laws in conformance with this provision. The Board's case load was then increased by the L.M.R.A. of 1947. At the same time Congress reduced the Board's budget appropriation in 1949. The cumulative effects of congressional and state activity placed an acute pressure upon the Board to clarify its jurisdictional position in relation to the "no man's land" problem. The Board was caught between a legal problem—the "no man's land" and a practical problem—its case load, resulting from the L.M.R.A., in terms of a decreasing budget. It decided to attack the practical problem through the 1950 standards. This choice was in consonance with the Board's legal function—to assert jurisdiction over those employers' operations that have a substantial impact upon the flow of interstate commerce. The Board felt the proper solution to the "no man's land" problem was a Congressional responsibility. "If Congress should be dissatisfied with the agency's (NLRB) ultimate action
in exercising its commerce jurisdiction, it might decide that legislative
guidance was desirable. However, the Board attempted to prevent fur-
ther enlargement of the "no man's land" problem. It refused to strictly
adhere to the dollar minimums of the 1950 standards in asserting juris-
diction. If an employer failed to meet the required dollar minimum of
the applicable standard and yet his business had a direct impact upon
the flow of interstate commerce, the Board would assert jurisdiction.
In addition, the Board encouraged flexibility in application of the for-
mal standards. It would combine several standards in many instances in
asserting jurisdiction in a case.

Finally, it should be emphasized that the result of the Board's
alterations in jurisdictional standards, under the Chairmanship of Mr.
Herzog, were not in conflict with its past precedent and policy in ad-
ministering the amended N.L.R.A. The dollar minimums of the formal
standards were lower than the dollar minimums in many of the cases where
the Board asserted jurisdiction prior to the 1950 standards. In each
questionable case involving an interpretation of the substantive content
of one of the standards, the Board carefully referenced its decision to
past precedent. The Board's policy in applying the standards remained
unchanged from what it had been under its ad hoc approach to jurisdic-
tional questions. It would consider an employer's operations in terms
of its impact upon interstate commerce subject to de minimis.

Chairman Herzog's alterations of jurisdictional policy and

David L. Benetar, "Jurisdiction of the NLRB Under the Taft-
Hartley Act," Proceedings of the Third Annual Conference on Labor, New
York University (New York, New York, 1950), p. 280. It was a remark
made to him by Chairman Herzog.
standards appeared to reflect the least amount of deviation from the legislative intent of our federal labor laws. Section 7 of the National Labor Relations Act and Sections 7 and 9 of the L.M.R.A. amendments to this basic law had committed our government to the encouragement of the collective bargaining process. In turn this commitment became the purpose of the Board's role in our society. The National Labor Relations Board's function was the protection of unionization in this country. Mr. Herzog was extremely careful in keeping this orientation in mind throughout his term as Chairman of the Board. This was evidenced in his flexibility in applying standards. He combined standards and ignored dollar minimums in asserting or extending jurisdiction, especially when the employer was a part of interstate commerce. Therefore, his policy and content changes in terms of the Board's jurisdictional standards were solely for practical reasons. His grasp of the spirit of this legislation provided the critical basis for the logic and consistency in the changes that did occur. It also provided an explanation for the coherence and minimal disturbance of the new alterations relative to past Board precedent and policy.

The Board's actual change, during Mr. Herzog's chairmanship, in moving from an ad hoc to a standards approach represented a clarification rather than a break with its past role. "The purpose of the 1950 standards was neither to extend or restrict jurisdiction nor to make any appreciable change. The Board was attempting to codify uniform and established principles, thereby avoiding inconsistency which was possible
in the ad hoc approach." Most professional practitioners in this area seemed to agree that this was the result of the 1950 standards. "On the whole this plan (1950 standards) worked pretty well during the period of nearly three years in which it was applied. Although the Board did not always inflexibly adhere to it and while at times it raised disagreement in application, the plan brought some measure of certainty to an area in which conflict and confusion often had reigned."\(^3\)

Under Chairman Farmer

Chairman Farmer and the Majority appeared to have informally initiated a retraction of the Board's jurisdictional area in 1953. They ignored, overruled or disagreed with the 1950 standards. They formally announced this retrenchment by changing the content of the 1950 standards in 1954. The "local-insubstantial" rationale behind their changes was inconsistent, illogical and incorrect in terms of the Board's function. The rationale completely ignored the legal context within which the Board's measurement of federal jurisdiction under the amended N.L.R.A., must occur—the impact of the employer's operations upon the flow of interstate commerce. It assumed many forms such as "twice removed from interstate commerce," "title to goods," and "number of employees employed


by an employer." While all of the forms ignored the Board's legal context of jurisdiction, the form concerning "number of employees employed by an employer" was in direct conflict with Congressional intent in the LMR.A. Congress specifically emphasized that this factor was entirely unrelated and irrelevant in establishing the importance of the employer's operations in terms of its impact upon interstate commerce. "The legislative history of the Taft-Hartley Act showed a rejection of a proposal to exclude employers of less than ten employees, on the basis of the theory that employee rights should not be based upon the size of the firm in which they work." "I myself feel that the larger employers can well look after themselves, but throughout the United States there are hundreds of thousands . . . of smaller businesses who under existing conditions have no (federal protection)."

The results of the Majority's reasoning were threefold in relation to their application of the 1954 standards. Decisions were internally contradictory. A single standard was applied inconsistently.

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8 Hanford Broadcasting Co., 110 NLRB 1257 (1954); Scranton Times, 111 NLRB 780 (1955).
There was no flexibility encouraged through the combination of standards.9

The drastic retraction of the Board's jurisdictional area under the Farmer administration was in direct contrast to the subtle clarification of the Board's jurisdictional area under the Herzog administration. In that the legislative, executive and judicial factors appeared not to have encouraged the Board to retract its jurisdiction, " . . . one is impelled to wonder whether wholesale overruling of long established precedents can be justified."10 The justification for this sudden dramatic change appeared to be founded upon the Majority's interest in encouraging and extending the Republican political philosophy. "It appears probable, that the new board hopes to limit federal regulation in order to expand the area of state action . . . Probably the basis of this desire . . . is the Republican antipathy to centralization."11 It is patent that the new Board changes have almost invariably been in favor of


10Edward L. Kimball, "The Eisenhower Board—Taft-Hartley Under a Republican Administration," Utah Law Review, IV (1954-55), p. 403. Member Murdock felt that "To equate the 1950 plan . . . with the present standards is to say that putting one's house in order is equivalent to tearing part of the structure down." Breeding Transfer Co., see footnote 2.

11"NLRB Under Republican Administration; Recent Trends and Their Political Implications," LV, p. 861. Assuming a certain degree of truth in this observation an interesting paradox occurred. It was a Republican Congress in 1947 that enacted into law the strict wording of Section 10 (a) which made it virtually impossible to cede jurisdiction to state labor relations boards. The idea in their action was to insure against any further state activity in the labor-management area in that their laws were too pro-labor. In 1953, it appears that a Republican Board was attempting to do exactly what had six years earlier been labeled as unwise by a Republican Congress—return to the states their rights in the labor-management relations area."
management... This justification of the Majority's change received support from the various speeches and addresses given by Chairman Farmer and Member Rodgers during 1953 and 1954. Chairman Farmer's language in case decisions reflected either little understanding of the Board's function or interest in using the Board as a political platform. His choice of language was "... at best naive; possibly it is disingenuous." The "facts" offered by the Majority in support of their retraction of the Board's jurisdictional area upon investigation appeared to offer no justification for their actions. They never offered any specific statistics or evidence showing the necessity for a retraction of the Board's jurisdictional area during Mr. Farmer's term as Chairman. "The Majority's citation of 'overall budgetary policies and limitations' as a factor in cutting jurisdiction is ambiguous ... unexpected and undocumented. It is in marked contrast to the actual facts which show no pressing budget difficulties and in fact a voluntary reduction in staff of the agency in the past year (1953) during which it has been operating with few exceptions under the 1950 standards." An inquiry by Member Murdock revealed, "As of October 8, 1954, only 16 complaint cases and 18 representation cases were available for assignments to legal assistants needing new assignments among a staff of more than 85 such assistants."
The Majority contended that the changes were also based upon an arduous and difficult appraisal of the 1950 standards. This investigation was conducted by a specially appointed committee of Board legal personnel.

In a letter to the Research Editor of the Columbia Law Review dated March 15, 1955, the Director of Information of the NLRB stated, 'We regret that we cannot comply with your recent request for the reports of the Committee of Legal Assistants on Jurisdictional Standards. These were internal memoranda of a confidential nature.' Letter to Alan Schwartz, Research Editor of the Columbia Law Review, March 15, 1955, on file with the Columbia Law Library.17

Member Murdock who ordered the committee established stated, "The Committee of Legal Assistants never considered whether changes were needed. Instead they proceeded on the well founded assumption that the Majority of the Board desired to make a cut."18 It would appear that the Board was at least exaggerating in relation to the research effort that supported the 1954 standards; especially when the above observations are coupled with the Board's later application of the new standards.

Chairman Farmer's changes in Board jurisdictional standards and policies appeared to reflect the largest degree of deviation from the legislative intent of the amended N.L.R.A. He virtually ignored this critical aspect of jurisdictional questions. His and the Majority's standards and policies appeared to reflect a policy that the L.M.R.A. changed the government's commitment to protect and encourage the processes of collective bargaining. "The new jurisdictional rules represent at their roots the enactment into law of the doctrine of states

17 Ibid., p. 858.
18 Ibid., p. 860.
rights, based not on a policy of the statute, but on the personal predilections of the members." These policies were extraneous to the Board's proper role. They were a misrepresentation of the legislative intent of federal labor laws as applied by the Board in the past. The N.L.R.A., the L.M.R.A., and the L.M.R.D.A. were not concerned with the encouragement of the employer's economic and social position in our society or the maintenance of an equilibrium of the federal vs. state system of government. Instead, these laws were concerned with "... encouraging a national labor policy in those areas which Congress has determined as appropriate for federal control." Chairman Farmer's actions did not appear intentional. "I wish to make it entirely clear that the NLRB is not and never should be thought of as a political organization or an instrument of partisan politics. The Board has no hand in formulating the Administration's labor policy. Politics play a proper part in the enactment of laws, but politics has no place in their administration." Instead, his actions appeared to be the result of a misunderstanding of the legislative obligation and administrative role of the NLRB in our government.

20 Ibid., p. 104.
21 Address by Chairman Farmer before the Joint Conference of the Industrial Relations Commission of the Edison Electric Institute, New Orleans, Louisiana, January 21, 1954, as quoted from Ibid., p. 100.
In conclusion, Chairman Farmer's and Member Rodger's speeches and addresses in public; Chairman Farmer's choice of language in case decisions; and the Majority's application of the 1954 standards appeared to support a charge of their concern with political interests, in their administration of the Board's jurisdictional activities. Additional support for this charge appeared in the Majority's refusal to present statistical evidence to enforce their claims of necessity in retracting the Board's jurisdictional area. Finally, neither the legislative, judicial, or executive factors provided any encouragement for their actions. When these several factors are combined, the resulting pattern appeared to support the charge that the Majority was employing a political rationale as a basis for their actions.

Under Chairman Leedom

Of the factors influencing the Board's reextension of its jurisdictional area, the legislative factor was the most important. Congress increased the Board's annual budget appropriation in 1958. Congress ordered the Board to use this money for an extension of its jurisdictional area. It froze the Board's formal standards in Section 14(c) of the L.M.R.D.A. as of August 1, 1959. The case load-budget appropriation relationship had no influence upon the Board's interest in a solution to the "no man's land" problem prior to the L.M.R.D.A. Following the Act, this relationship when coupled with the Board's internal organization problem, acted as a buffer against any further extension of its jurisdictional area. The Executive and the states were opposed to any further extension of Board jurisdiction. The federal courts acted as a catalyst.
in focusing Congressional and Board interest on the importance of the "no man's land" problem. This judicial concern was in large part responsible for the solution to the "no man's land" problem. The solution consisted of the composite efforts of the Board, through the incorporation of an advisory opinion procedure, and Congress, through an additional budget appropriation to the Board in 1958, plus the enactment of Section 14 (c) of the L.M.R.D.A. which allowed state labor relations boards more freedom in expanding their jurisdictional areas.

However, it appears doubtful whether a solution to the "no man's land" problem would have evolved in the absence of judicial and legislative impetus. Mr. Leedom considered the Board's role as passive in the application of the amended N.L.R.A.

By following a policy of neutrality and impartiality in administering these laws, coupled with a belief that the Board's jurisdictional policies and standards were a philosophical problem, Mr. Leedom, as compared to Mr. Herzog, implicitly avoided the obligation of encouraging the process of collective bargaining. The philosophical evaluation of the Board's function as an administrative agency appeared to be properly a legislative and judicial responsibility. Mr. Leedom was not enthusiastic in adopting an approach that would effectuate the legislative intent of the amended N.L.R.A. as applied by the Board. He appeared to be forced by Congress into extending the Board's jurisdictional area. However, in simplifying the 1954 jurisdictional standards and adopting a policy of flexibility in application of these revised standards, Mr. Leedom remained closer to fulfilling the Board's proper functional role than did Mr. Farmer.
In conclusion, Chairman Leedom's position in relation to the Board's policy and standards on jurisdictional questions could be characterized as a middleground between the other two chairmen. He did not completely ignore the legislative content and intent of the N.L.R.A., the L.M.R.A., or the L.M.R.D.A., as did Mr. Farmer. However, he failed to accept the obligation imposed upon the Board by these federal labor laws.

Recommendations

Between 1935 and 1953 the N.L.R.B. used precedent in the legal sense to develop its interpretation of the amended N.L.R.A. in answering jurisdictional questions. However, between 1953 and 1959 the Board appeared to change its basis for applying the amended N.L.R.A. to jurisdictional problems. Its assertion of jurisdiction appeared to rest upon the personal political predilections of its members. In general, these preferences favored local as opposed to national governmental administration of the amended N.L.R.A. The courts accepted and sanctioned the Board's original use of precedent as a part of the proper means of interpreting the amended N.L.R.A. Congress, by freezing the Board's 1958 jurisdictional standards, made it clear that the size of its jurisdictional area was not to be solely, if at all, a function of its members' preconceptions of its role as an administrative agency.

Of the two bases for applying the amended N.L.R.A., the first of the Board's approaches using precedent appears to have been the more efficient, consistent and fair one. It decreased the Board's time spent
on jurisdictional aspects of cases. It provided the Board with guidelines in applying current jurisdictional standards and policies. Finally, it appeared to be better in terms of the Board's providing to employers and employees more consistent, efficient and predictable treatment under the amended N.L.R.A. than they would have received if the Board had used the "personal preference" argument as a basis for jurisdictional decisions. Present Board members should strive to be aware of the past chaos that existed in its jurisdictional decisions and policies caused by personal preconceptions concerning its role as an administrative agency in our society. In so doing they should appreciate the value of the role of precedent as a means of encouraging Board efficiency, consistency, and fairness in exercising its jurisdictional prerogatives as set forth in the statutes being administered. Also, such recognition would provide a less arbitrary administration of certain labor laws in a system in which reliance on "law and order" is a prime value because it reduces arbitrary treatment of individuals and groups in our society.
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